

INTEGRITY IN POST EMPLOYMENT ACT OF 1986

HEARINGS BEFORE THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S. 2334

A BILL TO AMEND SECTION 207 OF TITLE 18, UNITED STATES CODE, TO PROHIBIT MEMBERS OF CONGRESS AND OFFICERS AND EMPLOYEES OF ANY BRANCH OF THE UNITED STATES GOVERNMENT FROM ATTEMPTING TO INFLUENCE THE UNITED STATES GOVERNMENT OR FROM REPRESENTING OR ADVISING A FOREIGN ENTITY FOR A PROSCRIBED PERIOD AFTER SUCH OFFICER OR EMPLOYEE LEAVES GOVERNMENT SERVICE, AND FOR OTHER PURPOSES

APRIL 29 AND JUNE 18, 1986

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CONTENTS

STATEMENTS OF SENATORS

	Page
Thurmond, Hon. Strom (chairman).....	1, 83
Metzenbaum, Hon. Howard M.....	4
Simon, Hon. Paul.....	10
Specter, Hon. Arlen.....	20
Biden, Hon. Joseph R., Jr.....	21
Mathias, Hon. Charles McC., Jr.....	83
Denton, Hon. Jeremiah.....	84
McConnell, Hon. Mitch.....	84
DeConcini, Hon. Dennis.....	85
Leahy, Hon. Patrick.....	85

PROPOSED LEGISLATION

Text of S. 2334—A bill to amend section 207 of title 18, United States Code, to prohibit Members of Congress and officers and employees of any branch of the United States Government from attempting to influence the United States Government or from representing or advising a foreign entity for a proscribed period after such officer or employee leaves Government service, and for other purposes.....	12
---	----

CHRONOLOGICAL LIST OF WITNESSES

TUESDAY, APRIL 29, 1986

Boren, Hon. David L., a U.S. Senator from the State of Oklahoma.....	5
Pryor, Hon. David, a U.S. Senator from the State of Arkansas.....	18
Keeney, John C., Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, accompanied by G. Allen Carver, Jr., Director, Conflicts of Interest Crimes Branch, Public Integrity Section, Criminal Division, U.S. Department of Justice.....	25
Martin, David H., Director, Office of Government Ethics, Office of Personnel Management.....	67

WEDNESDAY, JUNE 18, 1986

Trott, Stephen S., Assistant Attorney General for the Criminal Division, U.S. Department of Justice, accompanied by G. Allen Carver, Jr., Public Integrity Section.....	85
Kozak, Michael G., Deputy Legal Adviser, Department of State, and H. Lawrence Garrett III, General Counsel, Department of Defense.....	97
Banzhaf, John F., III, professor of law, George Washington University School of Law.....	129
Civiletti, Benjamin R., partner, Venable, Baetjer, Howard & Civiletti, and Lloyd Cutler, partner, Wilmer, Cutler & Pickering.....	145
McBride, Ann, senior vice president, Common Cause.....	178
Panel consisting of: Ornstein, Norman J., political scientist, American Enterprise Institute; Carol A. Bonosaro, executive director, Senior Executives Association; and Morton H. Halperin, director, Washington office, American Civil Liberties Union, accompanied by Jerry J. Berman, chief legislative counsel.....	183

IV

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

	Page
Banzhaf, John F., III:	
Testimony	129
Prepared statement	131
Berman, Jerry J.: Testimony	200
Bonosaro, Carol A.:	
Testimony	186
Prepared statement	189
Boren, Hon. David L.: Testimony	5
Carver, G. Allen, Jr.: Testimony	30, 88
Civiletti, Benjamin R.: Testimony	145
Cutler, Lloyd:	
Testimony	147
"Conflicts of Interest," lecture by Lloyd N. Cutler, at Emory University, 1981	157
Garrett, H. Lawrence, III:	
Testimony	111
Prepared statement	121
Letter to Chairman Thurmond, in opposition to S. 2334	124
Halperin, Morton H.:	
Testimony	193
Prepared statement	195
Keeney, John C.:	
Testimony	25
Letter from DOJ in response to a question by Senator Biden, re percent- age of people who should register under the Foreign Agents Registra- tion Act that are not registered	36
Prepared statement	48
Letter from DOJ in response to questions of Chairman Thurmond	61
Kozak, Michael G.:	
Testimony	97
Prepared statement	100
Letter from the State Department to Chairman Thurmond, response to question	109
Martin, David H.:	
Testimony	67
Prepared statement	78
McBride, Ann: Testimony	178
Ornstein, Norman J.:	
Testimony	183
Response to question from Senator Specter	186
Pryor, Hon. David:	
Testimony	18
Prepared statement	23
Thurmond, Chairman Strom:	
Testimony	1
Prepared statement	83
"U.S. Stand on Textile Talks Leaked, Negotiator Says," by Stuart Auer- bach, from the Washington Post, April 29, 1986	2
Trott, Stephen S.:	
Testimony	85
Responses to Senator Biden's questions	92
Responses to Senator Specter's questions	96

APPENDIX

Letter to Chairman Thurmond, from Elliot L. Richardson, in opposition to S. 2334	203
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INTEGRITY IN POST EMPLOYMENT ACT OF 1986—S. 2334

TUESDAY, APRIL 29, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 2:10 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senators Biden, Metzenbaum, Simon, Leahy, Specter, McConnell, Heflin, and Grassley.

Staff present: Dennis W. Shedd, chief counsel and staff director; Terry Wooten, counsel; and Cindy Lebow, minority chief counsel.

OPENING STATEMENT OF CHAIRMAN STROM THURMOND

The CHAIRMAN. The committee will come to order.

Today, we are considering legislation that will restrict all Federal employees from lobbying the Federal Government for 1 year, and from working for a foreign entity for 2 years, after they leave Government service.

This legislation also mandates a complete prohibition on certain high-level Federal officials from ever representing, assisting, advising, or lobbying in behalf of a foreign government or entity.

The significance of this legislation is that it applies to all Federal employees, regardless of rank, grade, or status. As well, it mandates criminal penalties for violations, including fines of up to \$250,000 and prison terms of up to 2 years, or both.

This bill will help ensure public confidence and integrity in Federal Government service. Fundamentally, it provides a uniform, straightforward and enforceable way to prevent those who are employed by the Federal Government from leaving public service and marketing their access and influence for private gain.

It will also terminate violations of public trust by halting high-ranking Federal officials who, by the nature of their jobs, are privy to some of our Government's most sensitive information about national security and commerce from vending that information to a foreign entity for personal gain.

There is something very disquieting to me, and I suspect the great majority of Americans, about high-level officials leaving the service of the Federal Government and going to work assisting, advising, lobbying, or in any way representing a foreign interest.

The absolute prohibition against this practice would help end the problem of foreign entities gaining knowledge and information in

any way about such things as our Nation's international trade strategy or defense posture from former officials whose knowledge of those issues could do harm to this country if it is conveyed to others.

The officials affected by a lifelong prohibition would include, among others, Cabinet Secretaries, most of their principal deputies, the Director of the Central Intelligence Agency, Secretaries of the armed services, the U.S. Trade Representative, the Director of the Federal Bureau of Investigation, and high-ranking White House officials.

In conclusion, I believe this legislation is a starting place for the Congress to consider much-needed changes to the confusing and oftentimes conflicting laws and regulations now governing former Federal officials who lobby the Federal Government or work for a foreign entity.

It is an attempt to restore rationality, consistency, and effectiveness to the ethics provisions applying to all Federal employees. Toward that end, this bill will apply to all branches of the Federal Government and to all Federal employees.

This initiative is in no way a response to any individual or organization currently lobbying. Rather, it is an attempt to ensure ethical conduct and the appearance of ethical conduct on the part of all former Federal employees who leave their jobs to lobby the Government on behalf of a client.

As my father was fond of saying, one's actions must not only be right, but they must appear right. I believe that that adage holds true for people who leave Federal service to lobby, and that is why I have proposed this legislation.

We have an impressive panel of witnesses assembled for this hearing. I look forward to an informative and an insightful hearing as we begin our review of this critical area.

An article appeared today in the Washington Post, entitled "U.S. Stand on Textile Talks Leaked, Negotiator Says." The subheading says, "Current or Former Official Held to Blame; Hearing on Thurmond Legislation Due Today." Without objection, I will place that in the record following my statement.

[The following was received for the record:]

[From the Washington Post, Apr. 29, 1986]

U.S. STAND ON TEXTILE TALKS LEAKED, NEGOTIATOR SAYS

CURRENT OR FORMER OFFICIAL HELD TO BLAME; HEARING ON THURMOND LEGISLATION DUE TODAY

(By Stuart Auerbach)

Key parts of the U.S. position in critical textile negotiations were leaked to a foreign government, undercutting efforts to provide protection for the domestic textile industry, the chief negotiator said yesterday.

Congressional sources said the information could have come only from someone still in government or who had left recently. Sources in the administration and on Capitol Hill refused to speculate on the leaker's identity.

Negotiator Charles R. Carlisle said he discovered that the U.S. negotiating position had been compromised when he made stops in Hong Kong, South Korea and Taiwan to describe the U.S. position in negotiations to renew the multifiber arrangement (MFA), which regulates textile trade. The three nations are leading Far East suppliers of textiles and clothing to the U.S. market.

Carlisle said, however, that the U.S. position was already known in at least one country. He declined to identify the country, although Capitol Hill sources said it was the British crown colony of Hong Kong.

"Certain sensitive information became known to some foreign governments before I conveyed it," Carlisle said in an interview. "It's a problem in this city, a very regrettable problem, that undercuts our ability to conduct the nation's business."

Word of the leak angered Sen. Strom Thurmond (R-S.C.), chairman of the Senate Judiciary Committee and a leading advocate of textile trade restrictions.

Thurmond introduced legislation to forbid government employees from working for any foreign government for two years after leaving U.S. service, and to ban them from lobbying the U.S. government on any issue for one year. Certain high-ranking officials would face a lifetime ban against representing foreign interests.

A hearing is scheduled today in the Judiciary Committee on Thurmond's bill.

As a textile-state senator, Thurmond has long fought for greater restrictions on imports. He is a prime sponsor of a bill, vetoed last year by President Reagan, that would place major restrictions on textile imports to protect domestic producers.

Carlisle is negotiating the renewal of the multifiber arrangement, which expires July 31, under the pressure of a congressional effort to override the Reagan veto. Lacking the two-thirds majority needed to override, congressional supporters have put off the attempt until Aug. 6. They hope to gain added votes if the administration fails to win a MFA agreement that is tougher on imports than the present one.

This is not the first time in recent years that important negotiating information has leaked outside the government. The major pro-Israel lobby group, American Israel Public Affairs Committee (AIPAC), received a copy of a classified report from the International Trade Commission recommending negotiating strategy for a U.S.-Israeli free trade agreement. The report was returned after the FBI opened an investigation.

Today's hearing comes as Congress is paying greater attention to former high officials lobbying the U.S. government on behalf of foreign and domestic clients.

The leak of information on textile negotiations, however, shows that the problem reaches beyond the high-profile, high-priced lobbying by former White House aide Michael K. Deaver that presently is getting most of the attention.

"I think we have a continuing problem in this city," said Carlisle, "and I think it is widely recognized that exceedingly confidential Cabinet discussions get out on the street within a matter of hours."

The Japanese Embassy, for instance, learned important information in Cabinet deliberations of a trade case involving machine tool imports three years ago. Prime Minister Yasuhiro Nakasone made a personal plea to President Reagan to change the decision.

The administration has been trying to combat this problem, government sources said, by limiting attendance at some meetings to the Cabinet member, an undersecretary and the White House staff. Lower-ranking administration officials complain, however, that lobbyists learn of the decisions before they do.

"It really undermines confidence of the government in trade negotiations," said Sen. David L. Boren (D-Okla.), who will testify at today's hearing on behalf of a bill he has offered that forbids former government officials from representing foreign interests for five years. He said he will propose extending the ban to former members of Congress.

"How can we have confidence that our side is bargaining for us when our negotiators can go and start working for the other side?" asked Boren.

"There is something very disquieting to me," said Thurmond, "about high-level officials leaving the service of the federal government and going to work assisting, advising, lobbying, or in any way representing a foreign power for compensation."

He said such a ban could prevent other countries from learning U.S. trade strategy or defense postures "from former officials whose knowledge of those issues could do harm to this country if it is conveyed to others."

Thurmond's bill would place a lifetime ban on the representation of foreign interests by high-level federal officials—including Cabinet secretaries, the CIA and FBI directors, secretaries of the armed services, the U.S. trade representative and high-ranking White House aides.

Other federal employees—including former members of Congress, retired military and officials of government-established corporations—would be restricted from lobbying the federal government for one year and representing foreign interests for two years.

The CHAIRMAN. We will now hear from the able and distinguished Senator from Ohio, Mr. Metzenbaum.

OPENING STATEMENT OF SENATOR HOWARD M. METZENBAUM

Senator METZENBAUM. Mr. Chairman, I want to commend you on offering this legislation and providing your leadership in connection with it. I believe that it is one of the most important bills to come before this committee.

A democracy works best when the people believe that the Government and its officers are honest, that the decisions made are based largely on the policy and political merits, not on which interest had the most clout or made the largest contributions.

The Mike Deaver affair is the latest in an escalating series of ethical problems to beset our Government. Mr. Deaver followed a well-worn path pursued by both Democrats and Republicans alike.

Dozens of employees in former administrations have capitalized on their Government service to represent an array of clients with interests in Congress and agencies of Government.

Anyone who thinks that this revolving door pattern is not fundamentally affecting people's confidence in the integrity of Government is a victim of self-delusion. Each new conflict of interest disclosure weakens our Government and insults our citizens. They deserve better.

Many do not believe that the decisions made in Washington are based on merit, with an acceptable dash of politics on the side. Instead, they believe that victory goes to the well-healed and the well-paid, and they are right.

The plain truth is that Washington has become a sinkhole of influence-peddling. The big question around town is not what are the merits, but whom did you hire. If you hire the right lobbyist, the one with the most access and deepest PAC pockets, you are likely to win, no matter what the relative merits.

The most disturbing thing about this trend is that people are becoming inured to corruption, conflicts of interest, and influence-peddling. These are now the perceived norms, and people nod knowingly that this is how things work and we might as well accept it.

We should not accept it, and the bill before us is an attempt to do something about this growing cancer in our democracy. It is said that the kind of broad ban contained in this bill will prevent good people from serving in the Government. I do not buy that.

It suggests that the only value of a congressional or executive branch employee to a business or firm is their access and clout, and that people's only interest in Government service is the pot of gold at the end of their tenure.

This Senator may be naive, but I like to think that most people are hired for their minds, their creativity, and their energy. I believe that people serve because it is a high calling and an honor, not a gold rush.

I have several questions about the bill's scope and how it will work, but I enthusiastically support it. In fact, I intend to try to strengthen it. I will offer amendments, Mr. Chairman, to extend the prohibition on lobbying to 2 years, to prohibit Members of Congress from representing foreign governments, to prohibit Pentagon officials from working for 2 years after they leave the Government

for any defense contractor whose business they significantly influenced while in the Government.

I will also explore with the chairman whether there is any way to add provisions imposing limits on PAC contributions to this measure. When you get right down to it, that is the most offensive of all the influence peddling that goes on around here.

It is time to reclaim Government from the lobbyists. It is time to substitute influence peddling with integrity peddling.

Thank you, Mr. Chairman.

The CHAIRMAN. Our first witness today is Senator David L. Boren from the State of Oklahoma.

Senator Boren, we are very pleased to have you come around, and you may proceed, Senator Boren.

STATEMENT OF HON. DAVID L. BOREN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator BOREN. Thank you very much. Thank you, Mr. Chairman. First, I want to applaud the opening statements made by you and by Senator Metzenbaum. I find myself in full and enthusiastic agreement with what has been said.

Let me say to Senator Metzenbaum, our legislation on PAC limits is pending in a different committee, and I appreciate hearing his support for that kind of approach as well.

Mr. Chairman, I appreciate the opportunity to appear before the committee to discuss the need for legislation to curtail and guard against the growing unethical influence of former high Government officials who go on to take lucrative lobbying positions for foreign interests.

A new form of influence peddling in Washington poses a threat to our country's national interests and is reaching crisis proportions which must be stopped. Millions of dollars are being spent by foreign governments and foreign interests to hire recently retired high-ranking Government officials to lobby their former coworkers.

It is no wonder that foreign aid has increased by 169 percent in the past 6 years, while education, agriculture, and other important programs are being cut. When our former officials switch sides, it should not surprise any of us that we do not appear to be getting a fair shake in the area of international trade negotiations.

I commend you, Mr. Chairman, for your insight in drafting S. 2334, and for scheduling these hearings. Fortunately, not only the committee, but the whole Congress and the Nation at large is becoming aware of the ethics issues which are of such critical importance to all of us.

There are numerous stories of mostly Washington-based lobby or consulting groups which have been hired by foreign countries to help them gain access to key Government officials with whom these lobbyists previously worked or were associated.

There exists a real threat to our national security and our interests in trade, defense, and foreign policy when administration or agency officials receive more input from foreign countries and foreign interests than from our own.

I am pleased that the committee is reviewing this matter, and encourage you to also review a similar bill which Senator Pryor

and I have introduced. It is patterned on a companion bill which was previously introduced in the House.

Senate bill S. 2176, introduced 5 weeks ago by Senator Pryor and myself, now has seven additional cosponsors, Senators Zorinsky, Andrews, Gore, Hart, Leahy, Sasser, and Baucus.

This bill is a version of a House bill introduced by Representatives Howard Wolpe and Marcy Kaptur, H.R. 3733. That bill now has over 90 cosponsors in the House and is scheduled for hearings early next month.

Our bill would quite simply prohibit any former high-level official or high-ranking officer of the uniformed service from representing or advising a foreign principal in transactions with the U.S. Government for 5 years after leaving that position.

A foreign principal, as defined in the statutes, includes the government of a foreign country or foreign political party or any foreign business or economic entity. A high-level Federal employee includes the top advisers to the President and the Vice President, all Cabinet members and other key officials, most of whom are appointed by the President.

It would include all employees in levels I through IV of the executive schedule in current law and some employees in level V, as listed in the bill. Particular emphasis is given to such sensitive positions, for example, as the Office of USTR, the trade negotiator, and others. Those in the military at the general officer or flag officer levels would likewise be prohibited from such lobbying.

I want to also make it clear that while Members of Congress were not included in S. 2176, as originally introduced, I have already stated that I favor their inclusion in legislation, and I commend you, Mr Chairman, for including them in the proposal that you now have before this committee.

Further, some additional provisions to tighten up the statutes on domestic lobbying as well as on representation of foreign interests, I think, should appropriately be included, and you have addressed that also in your draft legislation and I am certainly in agreement with you. I think we have to consider domestic lobbying inclusion in any kind of comprehensive ethics bill, while we also should consider, I think, exempting certain purely academic pursuits.

I think it is one thing to do academic research, for example; it is another thing to really be gaining access and peddling influence. I think we might consider some sort of an exception in that area. Let us say a former official has a scholarly or academic connection with a university in another country or something of that nature.

While I have certain reservations about S. 2334 and have admitted a flaw in S. 2176—it needs to be more comprehensive and include Members of Congress—I am hopeful that the committee will act quickly in studying this issue and come forward with a proposal that can receive attention soon by the full Senate.

I think it would be wrong to allow another session of Congress to pass by without taking action in this critical area. Let us take that action before this election, before we have others, perhaps, getting ready to go out the revolving door.

The goal of open and clean government is not one which is a partisan issue or a partisan question. We should all work together to see that safeguards can be imposed to give not only the legal secu-

rity from influence-peddling and access-buying that is needed, but, as has been said by both of you, the perception of a Government free from any ethical impropriety. The people have a right to expect no less.

I appreciate this opportunity very much, Mr. Chairman, and I wish you well in your efforts. I hope they will be successful and I hope that they will proceed quickly.

The CHAIRMAN. Thank you very much, Senator. I just have three questions here I might propound to you.

You have introduced S. 2176, dealing with foreign agents. Could you share with the committee any specific or general abuses which led to the introduction of your bill?

Senator BOREN. Mr. Chairman, there have been a number of articles appearing in the press, covered in the news media and the broadcast media as well, about the revolving door; how many of the former high-ranking officials of the Government are now on the other side, earning very large fees, some earning as much as 10 times, some even approaching 20 times, their former salaries with the Government, literally within days and weeks after leaving Government employment.

I would not want to single out any particular individual or any particular individual case, but I think it is something that is breeding a cynicism on the part of the people about their own Government.

When they read that people can immediately leave Government positions and receive this kind of compensation for advising clients on which doors they should knock on, what persons within the administrative services actually are making the decision or play a key role, and advising them in that way, people really ask the question

I met with 250 farmers in Garfield County, OK, over the weekend. We have right now 150 foreclosures pending in probably a 30-mile radius of where I had that meeting, and I was asked by several of those farmers in private conversation, Senator, is there really some sort of conspiracy going on? We read about these people that are getting millions of dollars the minute they walk off the Government job to go represent foreign interests. Were they planning to go represent them all along? Were they really in league with them so they would make sure they got those jobs when they left the Government? Were they bending over backward to favor those interests when they were still supposedly working for us? Is this why we cannot get markets for some of our agricultural products? Is this why our exports are going down?

These are the kinds of very real questions that are raised in the minds of people who are facing desperate economic circumstances here in this country. They wonder, is our own Government really looking after us, and I think they have a right to wonder that.

We had cataloged, I know, in just one newspaper over the weekend 40, 50, 60 cases of individuals switching sides, and I think just that perception problem alone and the questions it raises would be a legitimate basis on which this committee should act.

The CHAIRMAN. Senator Boren, your bill applies to high level executive branch employees and high-level military officers. My bill,

S. 2334, applies to all Federal employees in all branches of Government, including Members of Congress.

Could you support covering all Federal employees with tougher postemployment restrictions?

Senator BOREN. Yes, sir; I could. I think we certainly ought to include Members of Congress. I should have included that in my original draft. I think that, obviously, people have a right to ask the question, are you people in Congress who make these laws not willing to live under the same rules.

We should be willing to live under those rules and set the example, and I think we should be included. I would only urge some caution in terms of including all employees, perhaps even those down at a non-policymaking level, and to make sure that we clarify that lobbying means representing someone else's interests.

For example, let us say you have a postman who leaves Government service. He obviously should have the right to write a Member of Congress telling that Member of Congress how he feels about a certain issue that might be pending before us.

I think we would want to clarify that so that we avoid any constitutional problem of freedom of speech or freedom of association. But I think that is something that could be easily clarified by the committee, and should be.

The CHAIRMAN. Senator, your bill applies a 5-year prohibition period, restricting representation of or advisement to a foreign interest by certain high-level Government officials. S. 2334, my bill, applies a lifetime ban prohibiting employment with a foreign entity for high-level Government officials.

The lifetime ban in my bill was included to prevent disclosure of matters of national security and trade secrets. Can you comment on the differences in the time periods between your bill and my bill, 2334?

Senator BOREN. Mr. Chairman, I had set 5 years. I might mention the House companion bill set a figure of 10 years. There is no magic in the figure that I picked, partly trying to find some realistic balance that would give the legislation maximum chance for approval and passage. That was part of my motivation.

I can see that in terms of national security matters, persons with access to information of national security, classified information constituting official secrets, that perhaps a longer period of time should be imposed.

My thought was that, maybe this legislation will slow down the revolving door. We have so much of the revolving door right now that usually the identity of those in policymaking positions is turning over every 4, 5, or 6 years, and that is really what many of these people are buying. They think they are buying friendships and close associations with the people that are still in Government making the decisions.

I just selected 5 years as a period of time that would get you beyond that. As has been said here today, I think it is demeaning and degrading to Government employees and Government officials to say that the only worth they have is who they know, not what they know.

I do not think it is going to keep people from serving in Government. Let us hope we are attracting people to Government who

have skills, who have knowledge and ability to sell in a job market, and not just influence-peddling.

I think that if we set some reasonable length of time perhaps short of lifetime—that seems to me awfully final. Ten years later, after all the people with whom they have worked are no longer serving in Government—perhaps some period of time would be more appropriate, except I think you are right; if you can focus on narrowly defined national security where we are really dealing with matters that could impair our defense capability in the future. I think that would be an area that might be worthy of considering some sort of permanent ban. I am very sympathetic to the main thrust of what you are doing.

The CHAIRMAN. Thank you.

The distinguished Senator from Ohio.

Senator METZENBAUM. Senator Boren, does your bill deal with the problem of members of the Defense Department negotiating this week on behalf of the Government and next week on behalf of private contractors, the same people they were dealing with this week?

Senator BOREN. It does not. It deals with—if they were foreign interests or foreign-controlled economic entities, it would, not just foreign governments. Let us say foreign business interests, trying to get defense contracts; it would.

But I think, Senator Metzenbaum, that the committee should consider including domestic financial interests as well I think that you have raised the kind of question that should be considered in a comprehensive bill, and I hope the committee will go beyond just looking at foreign interests and look at domestic interests as well for a certain period of time.

Senator METZENBAUM. As I understand the present law, it provides that if a member of the Defense Department negotiating with respect to a contract—he may then go to work for that contractor, provided that he does not subsequently deal with the Government in connection with that particular subject that he handled for the government.

I remember some real horror stories about the Navy leases of those ships that were tax gimmicks—nothing more nor less than tax gimmicks—and the person who was negotiating them subsequently went to work for one of the major defense contractors in this country.

The argument was made, well, he will not be having anything to do with these leases and his work is in a totally different area. Do you have some views about whether that ought to be permitted?

Senator BOREN. I do not think it should be permitted. I think you have touched on something, and it may be difficult for the committee to come up with an exact definition. You see, the current law says only that they cannot go back and lobby those with whom they previously worked directly.

Senator METZENBAUM. Does it not also limit it to the subject?

Senator BOREN. It limits it to the subject—I believe a 2-year prohibition. You are not supposed to, for 1 year, go back to the exact agency, the exact people that you worked directly with.

Then, for 2 years, you are not supposed to go back and lobby on an exact subject on which you were working. Let us say you were

writing the specs on a certain contract; you cannot go back and then lobby for your client to get the very contract on which you wrote the specs for 2 years. After 2 years and 1 day, you can, but not for 2 years.

I think we also have to consider—and this also applies to foreign interests as well—what if you have held a certain position, or maybe you have been a Member of Congress, either one. You go to work, and you yourself do not go back and lobby your former associate, let us say, at the Defense Department, but you go to work for a firm and it is known you have gone there, and you certainly have a lot of broad friendships within, let us say, the Defense Department, if that is the department.

You are receiving large fees, but your colleagues, then, in the same lobbying firm by which you are being paid—they are going back and lobbying these people directly. So you can sit there and you can say I know the exact three people who wrote these specs; I know why they did; I know who they will report to. Now, here is whose door you should knock on.

You can give them all the advice about who to see, and I suppose it would even be questionable. They might even call you and say, Mr. Smith, since I have worked with you, you know, I cannot come and discuss this matter with you, but I am going to send my colleague, who is in the same firm from which I am being paid \$300,000 a year, over to talk with you, since, of course, it would be illegal for me to talk with you, but my associate from our firm is coming to see you.

I think we have to be very careful about that, too. I think the definition of the current law is too narrow to prohibit the kind of effective influence-peddling that we need to stop.

Senator METZENBAUM. I will try to work with the chairman and see if we cannot figure out some amendments that would be acceptable to him to cover that subject.

I have no further questions, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Illinois, Mr. Simon.

OPENING STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Thank you.

I want to commend you, Senator Boren, and Senator Pryor and the chairman for providing leadership here. Let us just be candid. We have an open case that everybody is talking about, the Mike Deaver situation, where, according to published reports, he is getting \$1.5 million from Saudi Arabia and \$250,000 from South Korea.

Is he getting that because he knows so much about Saudi Arabia or South Korea? No, he is getting it because of access. He can get into the White House, on behalf of Saudi Arabia and South Korea much more easily than you can for the farmers of Oklahoma. That simply is not right.

Part of the problem is that public service really ought to be regarded as public service and not just a stepping stone to some huge pot of gold. So I think we have a problem, and it is not simply Mike Deaver. It is a much more pervasive problem than that.

I hope that between your bill and the chairman's bill, we can come up with something that really does move solidly in the right direction. I simply want to commend you.

Senator BOREN. Thank you very much.

Thank you again, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator.

Senator BOREN. Thank you

The CHAIRMAN. Senator Pryor spoke to me at lunch. He is not on the agenda, but he said he wanted about 3 minutes to express himself here.

Senator, we are glad to have you. But first, I wish to place a copy of S. 2334 into the record.

[Text of S. 2334 follows:]

99TH CONGRESS
2D SESSION

S. 2334

To amend section 207 of title 18, United States Code, to prohibit Members of Congress and officers and employees of any branch of the United States Government from attempting to influence the United States Government or from representing or advising a foreign entity for a proscribed period after such officer or employee leaves Government service, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 17 (legislative day, APRIL 8), 1986

Mr. THURMOND introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend section 207 of title 18, United States Code, to prohibit Members of Congress and officers and employees of any branch of the United States Government from attempting to influence the United States Government or from representing or advising a foreign entity for a proscribed period after such officer or employee leaves Government service, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Integrity in Post Em-
5 ployment Act of 1986".

1 SEC. 2. DISQUALIFICATION OF FORMER MEMBERS, OFFICERS,
2 AND EMPLOYEES FROM ATTEMPTING TO IN-
3 FLUENCE THE UNITED STATES GOVERNMENT
4 OR REPRESENTING OR ADVISING A FOREIGN
5 ENTITY.

6 (a) PROHIBITION.—(1) Section 207 of title 18, United
7 States Code, is amended by striking out subsections (b)
8 through (e) and inserting in lieu thereof the following:

9 “(b) Whoever, having been a Member of Congress, an
10 officer or employee of the United States, including a special
11 Government employee who has served in excess of sixty days
12 during any period of three hundred and sixty-five consecutive
13 days, in the executive, legislative, or judicial branch of the
14 Government, or in any independent agency of the United
15 States, or an officer or employee of a Government corpora-
16 tion, Government controlled corporation, or an independent
17 establishment as defined in section 104 of title 5—

18 “(1) within one year after termination of employ-
19 ment with the intent to influence makes any oral or
20 written communication to any Member of Congress, of-
21 ficer or employee of the United States, including a spe-
22 cial Government employee, in the executive, legisla-
23 tive, or judicial branch of the Government, or in any
24 independent agency of the United States on behalf of
25 another person (other than the United States) for com-
26 pensation, financial gain, or other remuneration; or

1 “(2) within two years after termination of employ-
2 ment—

3 “(A) is employed by, or advises, represents,
4 or assists any foreign entity for compensation, fi-
5 nancial gain, or other remuneration; or

6 “(B) with intent to influence makes any oral
7 or written communication to any Member of Con-
8 gress, officer or employee of the United States,
9 including a special Government employee, in the
10 executive, legislative, or judicial branch of the
11 Government, or in any independent agency of the
12 United States on behalf of any foreign entity for
13 compensation, financial gain, or other remunera-
14 tion,

15 shall be fined not more than \$250,000 or imprisoned
16 not more than two years, or both.

17 “(c) Whoever, having been employed in a position listed
18 in section 5312 or 5313 of title 5 or under section
19 105(a)(2)(A) of title 3, at any time after termination of
20 employment—

21 “(1) is employed by, or advises, represents, or as-
22 sists in any way, directly or indirectly, a foreign entity;
23 or

24 “(2) with intent to influence makes any oral or
25 written communication to any Member of Congress, of-

1 ficer, or employee of the United States, including a
2 special Government employee, in the executive, legisla-
3 tive, or judicial branch of the Government, or in any
4 independent agency of the United States on behalf of
5 any foreign entity,

6 shall be fined not more than \$250,000 or imprisoned not
7 more than two years, or both.

8 “(d)(1) The prohibitions of subsections (a) through (c)
9 shall not apply to a former Member, officer, or employee who
10 is acting in his official capacity as an elected official of a
11 Federal, State, or local government.

12 “(2) The prohibition of subsection (b)(1) shall not apply
13 to an attorney appearing in a judicial proceeding before a
14 court of the United States.”.

15 (2) Section 207 of title 18, United States Code, is fur-
16 ther amended—

17 (A) by striking out subsections (h) and (i);

18 (B) in subsection (f) by designating such subsec-
19 tion as subsection (e) and striking out “subsections (a),
20 (b), and (c)” and inserting in lieu thereof “subsection
21 (a)”;

22 (C) by redesignating subsection (g) as subsection
23 (f);

24 (D) in subsection (j) by redesignating such subsec-
25 tion as subsection (g) and striking out “subsection (a),

1 (b), or (c)" in the first sentence and inserting in lieu
2 thereof "subsection (a)"; and

3 (E) by inserting at the end thereof the following:

4 "(h) For purposes of this section the term 'foreign
5 entity' means—

6 "(1) a foreign country;

7 "(2) a foreign political party;

8 "(3) a person outside of the United States, unless
9 it is established that such person is an individual and a
10 citizen of the United States, or that such person is not
11 an individual and is organized under or created by the
12 laws of the United States or of any State or other
13 place subject to the jurisdiction of the United States
14 and has its principal place of business within the
15 United States; or

16 "(4) a partnership, association, corporation, orga-
17 nization, or other combination of persons organized
18 under the laws of or having its principal place of busi-
19 ness in a foreign country."

20 (3) Subsection (a) of section 207 of title 18, United
21 States Code, is amended by striking out "; or" at the end
22 thereof and inserting in lieu thereof a comma and the
23 following:

24 "shall be fined not more than \$250,000 or imprisoned not
25 more than two years, or both."

1 (b) AMENDMENT TO CAPTION.—(1) Section 207 of title
2 18, United States Code, is further amended by striking out
3 the caption for such section and inserting in lieu thereof the
4 following:

5 "§ 207. Disqualification of former Members and employees and offi-
6 cers of any branch of Government from attempting to
7 influence the United States Government or represent-
8 ing or advising a foreign entity".

9 (2) The table of sections for chapter 11 of title 18,
10 United States Code, is amended by striking out the item
11 relating to section 207 and inserting in lieu thereof the
12 following:

"207. Disqualification of former Members and employees and officers of any branch
of Government from attempting to influence the United States
Government or representing or advising a foreign entity."

13 SEC. 3. EFFECTIVE DATE.

14 The amendments made by section 2 of this Act shall be
15 effective upon the date of enactment of this Act.

○

STATEMENT OF HON. DAVID PRYOR, A U.S. SENATOR FROM THE
STATE OF ARKANSAS

Senator PRYOR. Mr. Chairman, thank you and the members of the committee. I will just take 2 minutes, if that is satisfactory.

Senator METZENBAUM. Mr. Chairman, before he speaks, I think it is so appropriate that you are recognizing him. Senator Pryor has really given us distinguished leadership on this issue. He has been a constant thorn in the side of those who do not want to do anything on the subject, and I think we certainly ought to hear from him. I look forward to him; I would give him 2½. [Laughter.]

Senator PRYOR. Well, I thank the Senator from Ohio. I also thank the Senator from Illinois for his remarks.

There is a five-letter word, Mr. Chairman, now permeating this entire Capitol Hill, and it is greed, g-r-e-e-d, and it is that simple. It is left up to us right now whether or not we are going to do anything about it or let it get worse.

I want to commend you, Mr. Chairman, and the members of this committee and my colleague Senator Boren, from Oklahoma, for taking the leadership in this whole fight.

I became interested in this whole area through the Department of Defense and what we call the revolving door. I think probably one of the worse cases, I would say to my friend from Ohio, was about 3 years ago.

I went out to the State of Arizona. An incredible number of the U.S. Navy and Air Force personnel who were involved with the Maverick Missile very soon were working for Hughes Aircraft to develop the Maverick Missile. I think that is probably one of the most blatant cases we have seen.

We have seen the case, of course, in recent days, of Michael Deaver, a man I have never met. I sat through the Canadian trade negotiations on the Finance Committee across the hall, and I kept wondering, Mr. Chairman, truly, just what impact Michael Deaver might have had on those negotiations.

The Canadians are our great friends, but I think sometimes countries as well as corporations are extremely naive in who they ask to come to the Hill and speak their piece on their behalf.

Finally, Mr. Chairman, I think that as we approach this whole issue, we cannot—and I know Senator Boren has stated this on more than one occasion—we cannot just claim pride of authorship and say this is the way this legislation has got to be. We have got to work with you and the members of this committee.

I want you to know, sir, that I am openminded in attempting to accomplish the result that we all seek to accomplish. The American people are fed up. They are worried, they are saying enough is enough, and now they are looking for us to solve this problem.

Now that the light has been cast on this problem and it has come into the sunshine, we have got to do something. I was so pleased, Mr. Chairman, when I recently saw that you had introduced this piece of legislation because, as my colleagues here on this Hill know, no one knows the wind blowing out there in our country and is more sensitive to what is going on in people's minds than the distinguished chairman from South Carolina. I compliment you for that.

I ask, Mr. Chairman, that I might submit my full statement to be made a part of the record.

The CHAIRMAN. Without objection, that will be done.

Senator PRYOR. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you for your kind remarks, Senator.

Senator PRYOR. Thank you.

The CHAIRMAN. Any questions, Senator Metzenbaum?

Senator METZENBAUM. No. Thank you.

The CHAIRMAN. Senator Simon.

Senator SIMON. Just one question; maybe I could direct it to both of my colleagues.

Senator Pryor, you were Governor of Arkansas; Senator Boren, you were Governor of Oklahoma.

Senator PRYOR. I was Governor when he tried to annex parts of Arkansas to Oklahoma. [Laughter.]

Illegally, I might say.

Senator SIMON. But did either of you have this problem in State government, and if so, how did you deal with it?

Senator PRYOR. I do not think it was anything like what we are dealing with today.

Senator SIMON. Because there were not any of the same kind of dollars?

Senator PRYOR. I think from time to time, members of our State legislature—and I might say I was a former member of our legislature and we got paid \$100 a month at that stage—former members of the legislature from time to time left, either defeated or retired, attrition, or what have you, and I think they would go to work, for private interests or private corporations, but, nothing like the magnitude which we are seeing today, especially the foreign government involvement in our own domestic affairs. It was something I did not see in Arkansas, and I do not know about Senator Boren in Oklahoma.

Senator BOREN. I would not say it was a big problem. It was mainly at the legislative level, as Senator Pryor said, where you would have members of the legislature that would retire and go immediately into very active lobbying, say, back with committees that they maybe had chaired, and that was a problem.

But, again, you did not have the millions of dollars involved and you did not have the millions of jobs potentially at stake here, too, and I think that is what is so disturbing to our people who are being laid off because of unfair trade practices or losing their farms because of inability to gain access to export markets.

They sit here and they ask, you know, who these people have been working for whose salaries we have been paying. And is my loss of my job or my farm traceable back to someone who was looking to his next job or big fee when he left the government, not really looking after my interests? I think that is the real problem.

The CHAIRMAN. Senator Metzenbaum has one more question.

Senator METZENBAUM. One question for you, Senator Pryor. Do you feel that the legislation and its proscriptions should be applicable to Members of Congress and members of the Department of Defense, as well as the staffs of Congress?

Senator PRYOR. Senator Metzenbaum, I did not at the inception of this, but after reading what I have been reading recently in the

press and seeing the depth of this problem in this country, I now have come full circle and I do believe that this should apply to Members of the Congress and to the staffs.

Senator METZENBAUM. Do you think we could solve all the problems of lobbying if we just limited the lobbyists' pay to the same amount that members of the Arkansas Legislature received? [Laughter.]

Senator PRYOR. You know, that is a very unique way to approach the problem.

You know, every day, if I might add this, I walk down this hall at about 9:25 going to the Senate Finance Committee. Senator Boren and I are on that committee. Literally, we cannot walk down that hall—and I love all those lobbyists. [Laughter.]

Senator METZENBAUM. They love you, too.

Senator PRYOR. There are some of them here and, you know, they are wonderful people, but we cannot get into that Finance Committee room. I have a Darth Vader mask that some day I am going to wear so that I can go down there in disguise, because they pick and claw you to death all the way down that hall.

It is a dehumanizing sort of a situation, and I do not know what we are going to do about it.

Senator METZENBAUM. Sell tickets.

Senator PRYOR. I am wondering who is out there representing the people. Lobbyists have good messages; all of them have a point of view, but this thing is just an explosion about to happen in our country.

The CHAIRMAN. The distinguished Senator from Pennsylvania, Mr. Specter.

OPENING STATEMENT OF SENATOR ARLEN SPECTER

Senator SPECTER. You are tackling a problem which is much broader than the act in question. What is the answer, besides clearing the hall or having regulations which apply much more broadly to lobbying in this capital?

Senator PRYOR. Well, I just added as a little vignette to the overall issue, and I am not here to try to regulate those people. But I am here to say that former members of the Cabinet, former Members of the Senate and the House, and key staff members, should have some restrictions when they try to influence legislation or Government decisions.

Senator SPECTER. What about Senators?

Senator PRYOR. Yes; former Members of the Senate, I think, probably should be included in this if we are going to really get tough with the problem.

Senator SPECTER. Should there be tighter regulations that apply to Senators in terms of lobbying other Senators? We have very unique relationships. Should it be longer than 2 years?

Senator PRYOR. When you think about it, though, there are very few around here who used to be in the Senate who lobby. I think if a study were done, not over two handfuls of all the former Senators and Congressmen lobby. This is a relatively small number.

Senator SPECTER. Should there be tougher rules on Senators? Senators can go on the Senate floor.

Senator PRYOR. That is correct.

Senator SPECTER. It is a very different and unusual kind of persuasion, the kind of lobbying that goes right up to the actual moment of casting the votes.

Senator PRYOR. In my experience, though—and I certainly do not want to answer for Senator Boren—I do not know that I have ever seen a former Senator on the Senate floor in my 5 years here who has lobbied me on a piece of legislation while he was on the floor.

Now, it may have happened at another place or time, but not on the Senate floor.

Senator SPECTER. Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you.

The distinguished ranking member of this committee, Senator Biden.

OPENING STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Senator BIDEN. I just want to keep Senator Pryor here a little while longer——

Senator PRYOR. Keep Senator Boren here.

Senator BIDEN [continuing]. To save him from going out there with all those people, after what he just said about them. He is going to need some real help.

I apologize for being late. I have questions. But I will not delay my colleagues, except to suggest that I think that it is very important that there be a consensus arrived at and worked out here between the bill that you all have put forward, possibly something in conjunction with the chairman of the committee. I think it is something that—as you, I am told, Senator Boren, stated here today, the whole question of appearance of conflict and public confidence—is something that must be dealt with.

We not only have the problem as it relates to lobbying in the direct sense that occurred, as has been obviously focused by the *Deaver* case. But we all know that there are a lot of other people around from significant members of former administrations. We have attorneys general who are representing companies that come before us from both administrations; fine men all, but it really does cast doubt. I just wish we could pass a law saying—I guess I wish we could mandate good judgment. The thing that seems to me to be most lacking on the part of all the people in this town who held significant positions who are back here lobbying is good judgment and good taste, and I wish we could figure out how to do that.

I am not sure we can, but the direction the Senators from Oklahoma and Arkansas are sending this committee, and the Chairman of the committee has raised, I think warrants us not only pursuing, but I think it is important we come out with a finished product that makes some sense and I hope we can work together in doing that.

Thank you.

The CHAIRMAN. The distinguished Senator from Kentucky, Mr. McConnell.

Senator McCONNELL. Thank you, Mr Chairman. I want to commend you for holding these hearings, and also Senator Boren and Senator Pryor for coming.

I, for one, am never offended by a lobbyist who knows something about the subject. I do have a lot of problem being approached by people who presumably know nothing about the subject, but are holding themselves out as to be able to provide access.

I think a lobbyist who knows something about the subject is an integral part of the process around here, and I do not know a single Senator who is offended by that kind of approach.

On the other hand, those who hold themselves out to know nothing about anything proudly and presume to be able to approach various people either in the Congress or in the administration for the purpose of influencing us on issues they know nothing about, I find very troublesome.

I am particularly interested in the legislation that is being proposed, and I am sorry I missed what you Senators had to say about the subject. But I think it is a most important inquiry and I commend all of you who are involved in the process of trying to search for what the answers are to this vexing problem.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator.

Thank you very much, gentlemen.

[Prepared statement follows:]

STATEMENT OF SENATOR DAVID PRYOR

Mr. Chairman, I would like to thank you for giving me the opportunity to testify before your committee today on an issue that is very serious and needs to be dealt with legislatively -- the problem of former government officials going to work lobbying for foreign interests.

At the outset, I would like to commend you for your efforts in this regard. Your bill, S. 2334, which was introduced on April 17, 1986, contains some good provisions, and I believe it will be the legislation that will cause all members of the Senate to focus on the problem. I joined Senator Boren in introducing a similar bill, S. 2176, on March 11, 1986. My comments today will not relate to any particular bill, but will be directed at the overall problem.

Mr. Chairman, I guess in every administration there have been problems with high-ranking officials leaving government service and then starting to work for foreign interests. This frequently involves lobbying the Congress and also agencies of the federal government. In recent weeks, press accounts have told of the activities of certain former officials of this administration. In fact, today in the Washington Post we learned of a most serious leak in our negotiating strategy relating to the Multi-Fiber Arrangement (MFA). You were the principal proponent of the Textile legislation last year, Mr. Chairman, and I would hate to see all of our efforts undermined by a leak of highly confidential trade strategy by a former government official. Textile workers in Arkansas and other states, as well as cotton growers, are very interested in these trade negotiations. Providing competing governments with these trade secrets is like having the other team in your huddle in football when you're trying to call a play.

On another level, Mr. Chairman, it seems to me we're also dealing with a much broader problem -- the confidence of the American people in our country's leaders. When they hear of these press reports about former officials receiving hundreds of thousands of dollars lobbying for foreign governments, they are outraged. It's up to us to do something about it.

S. 2176 provides for a flat five-year ban on lobbying activities of former officials on behalf of foreign interests. Violation of this prohibition would result in a criminal offense against the United States punishable by a fine of \$250,000, imprisonment for up to two years, or both.

Your bill, Mr. Chairman, as I understand it would prohibit all federal employees from lobbying for anyone for one year. Then, for a two-year period they would be barred from representing any foreign interests. Finally, certain cabinet-level officials would have a lifetime ban imposed on them. The punishment for a violation would be the same as under S. 2176.

Mr. Chairman, I think both of these bills are steps in the right direction. Regardless of the precise wording of a bill that might ultimately be reported by your committee on thing is clear -- Congress must act to put limits on the ability of former officials to leave government service (taking with them very confidential trade, defense and other information) and then immediately begin working for people with interests adverse to those of the citizens of the United States.

I commend you again for your efforts. Your statements in today's paper, along with those of my colleague from Oklahoma, will bring some more attention to this issue. I look forward to working with each member of the committee in developing legislation in this area.

The CHAIRMAN. Now, we will proceed to other witnesses: Hon. John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

Mr. Keeney, you have a seat. Do you have a statement you would like to make?

STATEMENT OF JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY G. ALLEN CARVER, JR., DIRECTOR, CONFLICTS OF INTEREST CRIMES BRANCH, PUBLIC INTEGRITY SECTION, CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE

Mr. KEENEY. Yes, sir, I have; I have a written statement which I would like to offer, and I would like to just paraphrase my statement for about 4 or 5 minutes, emphasizing the legislation which is before you.

Before I start, Mr. Chairman, I would like to offer in evidence a substitute page 12 for my statement. Thanks to the courtesy of your staff, it was brought to our attention that there is a technical error in paragraph two.

Mr. Chairman, I would like to introduce my colleague, George Allen Carver, Jr., who is the Director of the Conflicts of Interest Crimes Branch of the Public Integrity Section of the Criminal Division, Department of Justice.

Mr. Chairman, I am pleased to be here today to present the views of the Department of Justice on the operation of one of the conflict of interest statutes, 18 U.S.C. 207, and with particular comments on S. 2334, a bill which would substantially amend section 207.

Mr. Chairman, at the inception I would like to point out the role of the Department of Justice and the Criminal Division with respect to the enforcement of the conflicts of interest provisions of the various statutes.

It is a limited role. We take the cases that have been referred to us by the various departments, the inspectors general, by other people and by outsiders, and then we make a determination as to whether or not an investigation or prosecution is appropriate.

Now, based on that, and that includes—in the past 5 years, we have had for prosecutive consideration something like 100 cases, of which, I think, 6 were indicted and 3 were successfully prosecuted.

I emphasize that just to make clear the limited number of cases that come before us and the difficulty in prosecuting those cases when we get them. And I might add, Mr. Chairman, that, as an institution, the Department of Justice has no evidence which demonstrates that section 207 violations are a significant law enforcement problem.

Part of that, insofar as enforcement is concerned, I think is due to the educational efforts of the various departments and agencies, and particularly the efforts of the Office of Government Ethics, whose head will testify here today.

We work with them in trying to bring to the attention of the various agencies these very complicated and difficult statutes.

Mr. Chairman, I want to turn now to the heart of my testimony. We share your concerns, as reflected in your statement on the floor of the Senate when you introduced the Integrity in Post-Employment Act of 1986.

We are prepared to work with the committee in achieving your objectives. Unfortunately, we have had a limited time to analyze your bill and come up with constructive suggestions. We do, however, have a few suggestions which I am prepared to pass on to you today.

Based on our analysis to date, we have some reservations about the bill in its present form. We do believe, however, that we should build on the present 18 U.S.C. 207. S. 2334 would eliminate three felony provisions from the statutes. We do not believe that there is any reason to eliminate these prohibitions which contain important and necessary rules governing the postemployment activities of Government officials.

These provisions cover situations where, one, a particular matter was pending under the former official's responsibility; there is a 2-year bar. Where there has been a substantial and personal involvement by the former official in a specific matter, there is a 2-year bar. Communications before the former official's agency—there is a 1-year bar.

Section 207, Mr. Chairman, could be amended to clearly proscribe nonrepresentational activity; that is, things such as behind-the-scenes advice which is not currently covered by section 207.

We would also be pleased to work with the committee on appropriate language to extend 207 to other branches of Government, if the Congress deems that appropriate.

We would also suggest, Mr. Chairman—and this gets into the heart of your concerns, particularly with respect to military secrets, trade secrets, and so forth—we suggest consideration of a misdemeanor notice provision requiring persons covered by the statute, persons subject to these various bars, during their period of restriction to disclose their contemplated employment to the agency which they had left.

Mr. Chairman, that concludes my remarks. I would be happy to answer any questions you may have. With more time, we might have been able to come up with some more constructive suggestions. I hope we have given some ideas that maybe the committee can build on in the course of its hearings and further study.

The CHAIRMAN. Thank you, Mr. Keeney.

Mr. Keeney, S. 2334, the bill I introduced, is an effort to streamline and clarify the ethical standards with respect to former Government employees. In your testimony, you have commented on several provisions of current law which would be eliminated by S. 2334.

As you have corrected in your oral testimony, S. 2334 does not eliminate the lifetime ban on former employees being barred on specific matters. Any former official would still be barred from appearances before his, or, under S. 2334, any agency.

Therefore, S. 2334 only marginally affects current law, while greatly strengthening both the scope and coverage of section 207.

Mr. Keeney, you indicate that section 207 violations are not really a significant problem. There could be any number of reasons

for this, such as the law is not being vigorously enforced, which I do not believe to be the case; the law is ambiguous; the law is drawn very narrowly; or there really is not a big ethical problem with either actual or apparent access or influence peddling.

How do you explain the lack of violations?

Mr. KEENEY. Several ways, Mr. Chairman. One, the statutes are very complicated, very involved, for one thing. Second, the agencies are making—or most of the agencies are making, I think, a conscientious effort to bring to the attention of their employees who are about to leave employment the proscriptions of 207.

Mr. Chairman, we are dealing here in an area where the personal ethics of individuals are concerned and we are moving on a line where the ethical considerations and the ethical violations come up to and approach a criminal violation, and most of the situations that we have seen do not cross the line.

It is conduct that you and I may not be proud of, but it is nonetheless conduct which is not within the presently drafted statutes.

The CHAIRMAN. Mr. Keeney, is there a problem with our ethics laws? Do you believe the American people are concerned with the current situation?

Mr. KEENEY. Mr. Chairman, I think that there are things that we could do with our current ethics laws, particularly with respect to the postemployment situation. What I was suggesting is that we put into the statute, into 207, a misdemeanor provision, which would be a reporting provision and require the individual who is leaving, particularly somebody who is in a sensitive position with access to sensitive information, classified or otherwise—that that individual would have to disclose to his former employer his contemplated employment.

Now, to go on from there, what would we do after the disclosure? I think that is something we could consider. We possibly, in appropriate situations, could get an injunction against the individual accepting certain types of employment, or if not that, an injunction against the disclosure of certain types of information in his new employment.

The CHAIRMAN. Mr. Keeney, are our ethics laws broad enough in whom they cover? Are they precise enough in what they cover?

Mr. KEENEY. Well, except for the suggestion I have offered, I have difficulty in going much broader in the coverage, Mr. Chairman, without running into constitutional limitations.

The CHAIRMAN. I will ask a few here and you can answer the rest of them for the record to save time.

Mr. Keeney, are current laws sufficient to prevent the spread of vital national information to foreign interests? Aside from the restrictions of the dissemination of classified information, what prohibitions impact on those who have this information, and is the Foreign Agents Registration Act effective in this regard?

Mr. KEENEY. It is partially effective, Mr. Chairman, where they are overtly acting as representatives of foreign governments. The espionage laws are also applicable in this area.

I also think, Mr. Chairman, that with respect—and you are covering this in a different manner than I am proposing, but it is appropriate, I think, to have a limitation on certain types of employment of particular people who have access to sensitive information.

It is appropriate because with the time limitation, we all recognize that even with very sensitive information, even with classified information, its importance to the Government decreases, for the most part, as time goes by. So that argues, I think, very strongly for a time limitation.

The CHAIRMAN. Mr. Keeney, S. 2334, my bill, mandates lifetime prohibitions against certain high-level employees, such as the Director of the Central Intelligence Agency, the U.S. Trade Representative, and others who have access to this country's most sensitive information on matters of national security and trade.

Can you discuss the constitutional implications of the lifetime ban in S. 2334 in conjunction with the lifetime ban currently found in title 18, section 207(a)?

Mr. KEENEY. Yes, sir, because I think that the ban in your bill would be broader, and I think that the courts, in determining constitutionality, would adopt a reasonableness test.

In adopting the reasonableness test, you would have to take into consideration the scope of the individual's responsibilities and how seriously the lifetime ban infringed on his right of association and his right to make a living.

I think it is an area where time limitations are important, Mr. Chairman.

Senator BIDEN. Mr. Chairman, can I ask for a clarification on that point?

The CHAIRMAN. Yes.

Senator BIDEN. Would that have to be an affirmative defense offered? Is the burden on, in your view of the constitutional application the court might make—

Mr. KEENEY. I do not think so, Senator Biden. I think it would be appropriate for the Congress, in its wisdom, to select a time period or a mechanism whereby, in conjunction with the—

Senator BIDEN. That is not the question I am asking, what is appropriate. I am asking a constitutional question. Constitutionally, would you define for me—when you answered that the court would apply a reasonableness test, would the burden be upon the prosecution to demonstrate that what they were asking was reasonable, or would it be an affirmative defense?

Mr. KEENEY. It would come up in the context of a criminal prosecution and the defense would raise the constitutionality of the statute. I do not think it would be an affirmative defense, Senator.

Senator BIDEN. Thank you.

The CHAIRMAN. Mr. Keeney, is not such a lifetime ban even more constitutionally acceptable when the national security or other vital national interest such as trade is at stake?

Mr. KEENEY. I think it is more justifiable, and the courts would give great consideration to the fact that you are protecting national security information. But, Mr. Chairman, national security information which was vital to this country in 1945 is not necessarily vital to this country's interests in 1986; it may be.

That is why, again, I come back to the time limitations and some mechanism whereby the expertise of, say, in this situation, the Department of Defense could be brought into play.

That is one of the virtues of the proposal we have for a disclosure provision with respect to what employment the individual is going

to get involved in. Now, the disclosure provision could go on indefinitely. That would be whatever you thought was an appropriate period for requiring a continuing disclosure of contemplated employment.

The CHAIRMAN. Although present statutes proscribe divulging classified information, Government officials who accept employment with foreign entities could indirectly divulge classified information.

For example, the advice of such a former Government official could be based on this classified information even though the information itself is not divulged.

Are there present restrictions that proscribe this type of conduct?

Mr. KEENEY. Not clearly, Senator. That is one of the things we are proposing, that this sort of behind-the-scenes advice—that we try to come up with an articulation within a statute that would make illegal this type of advice, which can be very detrimental to our national interest.

The CHAIRMAN. S. 2334, my bill, proposes a lifetime ban on employment of certain officials by a foreign interest. What alternative, if any, can you propose that would protect against such potential misuse of information critical to the national interest?

Mr. KEENEY. Well, I think again we come back to reasonableness and a time limitation, a limitation by subject matter, a limitation by country which the individual would be allowed to represent, and again the concept of fairness to the employee.

You might be barring the employee from employment with a foreign nation in a situation where his former experience and former knowledge has no real relationship to the interest the Government is trying to protect, and I do not think you want to do that, Mr. Thurmond.

The CHAIRMAN. The Department of Defense buys billions of dollars of military wares from private defense contractors. Many potential abuses could result due to the large number of employees and the large amounts of money involved in the procurement process.

Could you please discuss how well the present Ethics in Government Act, found at title 18, United States Code, section 207, has worked in preventing abuse in defense procurement?

Mr. KEENEY. Well, the Department of Defense, in my understanding, has in place procedures where they notify employees as they are leaving as to what they can and what they cannot do in the course of their future employment in relation to their past employment.

One of the things that they cannot do, for instance, is, under 208, they cannot negotiate with a defense contractor with whom they are dealing as a public employee for future employment. That is a violation.

These sorts of notifications are being given. It is a very troublesome area, Mr. Thurmond.

My colleague has a comment.

The CHAIRMAN. I will be glad to hear anything he wishes to supplement.

Mr. CARVER. Just one comment, sir, with respect to this prepost-employment period. The current law provides that at the point where negotiations begin and come into existence, the law gives rise to a prohibition.

The prohibition is not the negotiating concerning prospective employment or future employment, because people can do that who work for the Government. But once they do, they are prohibited from participating personally and substantially on a particular matter in which their prospective employer has a financial interest or in which they personally have a financial interest. That is just a point of clarification.

The CHAIRMAN. Now, S. 2334, my bill, as drafted, would be effective upon the date of enactment. Hence, the lifetime ban, the 2-year ban and the 1-year ban will apply to some employees of the Federal Government who are already out of public service, even though this bill is not retroactive; namely, no activity occurring before enactment could be actionable.

Could you discuss the constitutional implication of these bans applying to those who have already left public service?

Mr. KEENEY. Yes, sir. I think, depending upon the circumstances, this provision being applied to persons who have already left the government could be constitutional, and I think a lot of factors would go into that; again, the time limit because, as I pointed out, the value of the information which the people have frequently diminishes with time.

If we had a notice requirement so that they had to give notice to their agencies with respect to their employment, that would be helpful because it gives the agency an opportunity to take appropriate action and to notify the individual of the dangers to the country that might arise from his disclosing certain of his information.

The scope of the subject matter, I think, Mr. Chairman, would be a significant factor in determining reasonableness. I think the courts will weigh in the balance all of these things in relation to the rights of the employee—his right to associate, his right to seek employment.

The CHAIRMAN. The distinguished Senator from Delaware, the ranking member.

Senator BIDEN. Thank you very much.

Sir, I understand you testified in the House that there have only been five prosecutions and three successful prosecutions under the existing postemployment conflict of interest statutes during this administration.

What were these cases, and can they be, in fact, characterized as the only postemployment conflict of interest cases in the last 5 years?

STATEMENT OF G. ALLEN CARVER, JR.

Mr. CARVER. I will try to answer that, sir, as best I can. I cannot give you the details of all the specific cases. The cases span a period of, as I recall, 1980 through the early part of 1985, so that it spans a considerable period of time that we are talking about, and are based on reports that arrived from the U.S. attorneys' offices

throughout the country, as well as our own statistical information that we keep on file in the Public Integrity Section.

Those cases dealt with postemployment prosecutions under 18 U.S.C. section 207. They do not address the numerous prosecutions that have been brought under other conflict of interest statutes, including 18 U.S.C. section 208, which is the one dealing with participating in matters in which you may have a financial interest or your prospective employer may.

There have been more prosecutions in that area than in the post-employment situation. One case, to illustrate the kind of case that can arise, involved a former revenue agent who had worked on an audit for a taxpayer. He left the U.S. Government, then came back representing the taxpayer.

The result of that particular attempt to prosecute the case was not successful.

Other cases involving prosecutions under the statute resulting in convictions, to the best of my recollection, resulted from pleas, and I am not aware of a jury conviction.

Senator BIDEN. I think all three were pleas.

One of the things that I—

Mr. KEENEY. Senator, could I add to that?

Senator BIDEN. Sure.

Mr. KEENEY. You have to keep in mind here that in addition to straight 207's or 208's, we have a lot of these situations that are prosecuted as gratuities or as straight briberies.

Senator BIDEN. I understand that.

Mr. KEENEY. And we will go with the greater offense if we have the opportunity to do so.

Senator BIDEN. What I am trying to do is deal with what I think is the more difficult case to bring and to make and which I think is the subject of this discussion. Clear bribery cases where you can make that case—they do not raise nearly the problem in terms of propriety—that is, the propriety of the government putting up with that conduct.

Mr. KEENEY. Gratuity comes pretty close, Senator, but you are right; bribery is not.

Senator BIDEN. Let me ask you—I am told that there were about 50 matters under 207 that were referred to the U.S. attorney during this 5-year period and only five brought. Really, what I am trying to get a handle on here is this: We can pass legislation here in the U.S. Congress and signed by the President, but if the Justice Department either believes that there is not enough compliance requirement in the law to establish a case if, in fact, the law is violated, or if, in fact, the prosecutor believes, as in many cases, that there is not any jury appeal in these cases, they do not bring the case not because they are not convinced that the law has been violated, but because they believe that the judgment of a jury would be one that, notwithstanding they might make the case, they will not find a conviction because they do not think the law makes sense.

Can you comment on why you think it was only 5 out of 50 cases were brought? Is it that the 45 were so totally frivolous that they had no basis, or that there were judgment calls made as to whether or not they could be won? I mean, can you give us a sense?

Mr. KEENEY. Yes. The sense is, Senator, that most of these cases, at least most of those I have seen, have been cases which technically meet the standards of the statute. In other words, they can get by a rule 29 motion, but there is no realistic expectation that a jury will convict, and it would be a waste of resources to bring them because the juries have a tendency to give sympathy to a defendant who is being charged with what sometimes juries view as an ethical violation and they do not sometimes see the real criminality involved in the situation.

Senator BIDEN. The reason I raise it is obvious. There is concern on the part of some of us that that is a mindset that has grown up in Washington in the last decade or so, that that is a Washington view, the one you expressed about what juries would think, and, in fact, not a public view.

Quite frankly, I get a different sense out in my State, and I suspect it is the reason why the chairman moved on this as rapidly as he did. There seems to be a willingness and a desire to move on the ethical violations that you all view differently—"you" in an editorial sense, just as far as making a judgment—that although you can technically make a case, juries will view this not as a criminal offense, but an ethical offense, which is somehow different, and therefore they will not convict.

I would really like to see you move forward and try and find out whether or not your judgment is right. I am not sure, to be honest with you, whether you have a sufficient basis on which to make what is obviously a political judgment you are making, not in the partisan sense.

Mr. KEENEY. I understand, Senator. May I just make an observation on that?

Senator BIDEN. Sure.

Mr. KEENEY. Half of the cases that have been turned in, half of those 96 or so, were handled in the field by U.S. attorneys and assistant U.S. attorneys, who presumably reflect the attitudes of their district with respect to whether or not a conviction can be obtained.

It is not a question of a limited number of people in Washington making these judgments.

Senator BIDEN. Well, let me be even more blunt with you. Some might suggest that those U.S. attorneys were picked because they reflect an attitude about Government and about certain relationships. Let me say it this way. There are those in this town and those who are associated with this and the last administration and other administrations—I have been here for four administrations now—and they seem to fall down into two categories: One, those who view working for the Government, whether it is as a U.S. attorney or as an assistant to the President or as a U.S. Senator, as a great honor and a public trust; two, those who view it as a sacrifice that they are making for their Nation, and wonder why does not the public understand more the sacrifice that they are making. You are only making, if you are a U.S. attorney, x number of dollars; you could be making a great deal more out there.

So there is sort of this thing in the minds of some in Government who hold Government jobs, whether it be in Washington or outside of Washington, that Government employees at that level are

making serious sacrifices. So the standards to which they should be held should not be quite the same as otherwise might be required.

U.S. attorneys are not like Congresspersons or Senators or Governors or Lieutenant Governors, who are elected. They are political people who are political allies of political Senators and Congresspersons in a political Justice Department, like all Justice Departments are.

Mr. KEENEY. I take exception to a political Department of Justice. I have been there 35 years, Senator.

Senator BIDEN. I understand that.

Mr. KEENEY. And you would be proud to see the way the Department of Justice operates.

Senator BIDEN. I would appreciate it if you would not get into this sort of notion that if I raise a question, it is an attack and an affront on your integrity.

Would you not acknowledge that there are at least among some people in Government—Senators that you know, Congresspersons that you know, people who work in the Justice Department—that you know who feel that they are making a sacrifice working for the Government?

Mr. KEENEY. Oh, I do not question that, Senator. I am not one of them, but I do not question that there are such people.

Senator BIDEN. I understand.

Mr. KEENEY. Not too many, Senator, but there are some.

Senator BIDEN. Would you acknowledge, also, that there are those who suggest that somehow the rules are just too stringent upon people who are making the sacrifice? Do you not feel that there is at least some mindset in this town that is shared by Democrats as well as Republicans to the effect that, "why should those rules apply to me?" I mean, you have not noticed that?

Mr. KEENEY. Well, that may be an attitude that exists. It does not exist to any substantial degree, if at all, among the people with whom I work, Senator.

Senator BIDEN. Well, I think it would be a useful thing maybe to make the case, since I do not think I am the only one who at least raises that issue in his mind, not about you, not about your division, but just about Government generally.

You know, we came in with the idea that, you know—it seems like there has been a reaction to what was viewed as an overreaction by the Carter years, the overreaction that we were, you know, asking people to be too squeaky clean; that we kept good people out.

Let me back up. The tendency is going to be to take this personally or departmentally. Just look at what we did in the U.S. Congress in terms of conflict of interest laws. We went all the way from the requirement where we had to do everything and list every single asset we ever had to the requirement that all we have got to do is list categories of what we have in terms of our net worth.

So all I am trying to point out is there is a pendulum effect to the way people approach ethics in Government and the way governments approach ethics in Government and administrations approach it.

So I think it would be useful if, in fact, we had harder data for the record on the basis upon which it was decided that the cases

that were referred were, in fact, not to move forward; why it was decided not to move forward—not every case, but you can, you know, break it down for us a little bit. Otherwise we may very well pass a law here that you all say is constitutional, but then you say to us, in effect, in the application of it, notwithstanding the fact that it is constitutional, notwithstanding the fact that you can successfully establish that the law has been violated, it does not do any good to prosecute under it because it is viewed as an ethical violation and therefore juries will not proceed on it. That is the point I am trying to get to.

I do not have any more questions, but I am anxious for your comment.

Mr. CARVER. Perhaps this will be helpful just slightly. I can give you, I think, a rough estimate on these figures. You will see a substantial number of 207 referrals that are listed in the reporting system that are referred as 207 matters and, upon analysis, a determination is made that the statute is not implicated or the statute has not been violated.

Obviously, one of the jobs of these prosecutors in the field, many of whom are professional prosecutors in the offices, is to review these cases fairly and to make a determination of whether or not the case should be brought.

One of the determining factors will be that no crime was committed. This has occurred in a number of those instances; with a rough guesstimate, I would say 25 or 30 percent.

There would be another percentage involved in these cases where you are unable to determine whether or not a crime has been committed. You simply cannot resolve it through investigation. You have conducted as thorough an investigation as you feel is appropriate and you have not been able to decide. Therefore, the case does not go to prosecution or go any further. There would be a substantial percentage of those as well.

In those cases, then, which involve evidence of prima facie crimes, time and again what you see in those cases is conduct of individuals that is best dealt with administratively. I dare say that everyone in this room, if they were to see the cases, would agree. Indeed, Congress, in passing the Ethics in Government Act and amending the old 207 and then promulgating the new, recognized that very strongly in providing 18 U.S.C. section 207(j) as an alternative to criminal prosecution; an administrative means which has some teeth in it if agencies are prepared to use it and to employ it.

Senator BIDEN. That is the question, is it not?

Mr. CARVER. Exactly.

Senator BIDEN. I am not questioning the ethics of prosecutors. I am questioning whether or not it makes sense for us to move forward like this if, in fact, the end result would be that, as a practical matter, you believe juries and/or prosecutors will conclude that it is not something that is worth taking the action for, either because they will not get a conviction or it does not rise above the legal threshold. That is what I am looking for, and you have answered the question by outlining for me how you would break down the cases.

Let me ask you one other question and then I will yield. One of the aspects, obviously, of the chairman's bill is the foreign agents'

portion. As I understand it, the present registration law does not prohibit lobbying that relates to former high officials on behalf of foreign countries, is that correct?

Mr. KEENEY. That is my understanding, Senator. It is a disclosure statute.

Senator BIDEN. It is a disclosure statute. Now, present law does not prohibit lobbying but it does require all lobbyists to register with the Justice Department, is that correct?

Mr. KEENEY. Yes.

Senator BIDEN. Now, as I understand it, there has not been any prosecution under that registration statute in over 20 years—not just this administration, but in 20 years is the information I have. Now, is that because you all—and you obviously cannot speak for—you have been there 35 years; you may be able to speak to it.

Mr. KEENEY. Yes.

Senator BIDEN. Is that because, in fact, there is such good compliance?

Mr. KEENEY. Yes. The simple answer is yes and, you know, there is an effort to treat it as a disclosure statute and to make a maximum effort for compliance, Senator.

Senator BIDEN. Now, I am told, and I do not know this to be true—I am told that the—

Mr. KEENEY. Senator, if I may just finish on that, it might be helpful.

Senator BIDEN. Sure.

Mr. KEENEY. We have a notice policy with respect to foreign agents' registration so that if somebody does not register—maybe they do not realize they have to—we become aware and we give them notice, and then if they do not comply, we prosecute. But the effort is compliance.

Senator BIDEN. The effort is compliance. Well, then, that may explain the next thing I was about to ask you with regard to this. I was told that the head of the Foreign Agents Registration Unit acknowledged that there were probably 30 to 60 percent more foreign agents working than foreign agents who have registered with the Department of Justice.

Now, first of all, do you know that to be true?

Mr. KEENEY. I do not know it to be true, no, sir. I have no idea, Senator.

Senator BIDEN. OK. I would appreciate it, for the record, if you could do a little checking on that.

Mr. KEENEY. I was wondering if the person who made that statement was talking about foreign agents in the sense that people register as representatives of foreign governments for commercial purposes or actual spies.

Senator BIDEN. The answer is, I think, the former, but I acknowledge at the outset I do not know, and that is why I am asking you for help, if you can find out.

Mr. KEENEY. We will try to get it, Senator.

Senator BIDEN. Thank you very much.

[The aforementioned was subsequently supplied for the record:]



U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

22 MAY 1986

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C.

Dear Mr. Chairman:

During the course of testimony by Department of Justice representatives before your Committee on April 29, 1986, at which time your bill, S. 2334--Integrity in Post-Employment Act of 1986--was under consideration, Senator Joseph Biden asked a question about a statement made by the head of the Foreign Agents Registration Act Unit of the Criminal Division to the effect that 30 to 60 percent of the people who should register under the Foreign Agents Registration Act are not registered.

We have discussed this matter with Mr. Joseph Clarkson, the head of the Foreign Agents Registration Act Unit, and he has advised that he in fact has made such statements in the past, but that he usually qualifies the statement by indicating that it is a personal estimate and that there is no way of proving its accuracy.

I trust this will be responsive to the Senator's request.

Sincerely,

John R. Bolton
Assistant Attorney General

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Keeney, could it be that you see no problems in section 207 because that provision, as written, does not adequately cover the problems that exist?

Mr. KEENEY. Well, I did not say that, I do not think, Senator. I said we should build on 207, and in building on 207 I would try to pick up the representational issue so that a person who is providing advice, behind-the-scenes advice, with respect to his former agency within the limited time periods—that that individual would be covered. We would like to see that covered.

That is not covered right now in the statute; you are exactly right.

Senator METZENBAUM. Well, as I understand it, one of the major amendments you would propose—or is it the only one? I am not certain about that.

Mr. KEENEY. I am proposing the one I just mentioned.

Senator METZENBAUM. The misdemeanor one?

Mr. KEENEY. No. I am proposing this, which presumably would be a felony provision, which would cover the person who is giving behind-the-scenes advice based upon the knowledge that he acquired as a Government official. That is one.

The misdemeanor provision is a separate provision which would be a disclosure provision requiring departing officials, whoever Congress chooses to cover, to report to their agency during the time period—the 2-year time period or whatever it might be—what employment they are about to take.

If they change employment during the 2-year period, they would have to report to their agency what the new employment would be.

Senator METZENBAUM. Once they had reported, that would be all that you would require of them and you would provide that if they failed to report, they violate the misdemeanor and there would also be the right to injunctive relief in the Department?

Mr. KEENEY. Presumably, there would be, and if Congress decided, maybe the Congress would want to put some sanctions on if they entered into certain types of employment which would result in disclosure of sensitive or classified information.

I was just opening up a dialog, Senator Metzenbaum, with respect to the areas that we think could be explored.

Senator METZENBAUM. You think that S. 2334 goes too far. Is that the thrust of your testimony?

Mr. KEENEY. That is a fair comment. I think it goes too far in the total proscription with respect to certain categories, and I think that we would have difficulties with the courts sustaining the legislation if we did not narrow it to some degree.

Specifically, with the thrust of the proposed legislation, I am pointing out that we are running into some potential constitutional pitfalls.

Senator METZENBAUM. Well, the main constitutional pitfall you seem to be concerned about is the lifetime proscription, the lifetime prohibition?

Mr. KEENEY. That is a serious one, I think.

Senator METZENBAUM. So if we limited it to a reasonable period of 10 years or something of the kind, you would have much less difficulty with it?

Mr. KEENEY. I would have much less difficulty. It would still not eliminate it totally, and I suggested that there be other restrictions; in addition to the time, that you narrow the areas where they would not be allowed to operate based upon their governmental experience.

Senator METZENBAUM. I am a little concerned about what you had indicated earlier, that there ought to be some law having to do with the use of special information gained while they were in Government.

I was not certain exactly how you put it, but it seemed to me that it would be a very difficult evidentiary matter to prove in court, the first suggestion you made. Do you have any difficulty with that?

Mr. KEENEY. I am sorry. Which suggestion?

Senator METZENBAUM. You suggested that there ought to be some proscription, some illegality, if an individual had worked for the Government and then was found to have used certain confidential information that he gained while he was in government on behalf of a foreign government.

Mr. KEENEY. Well, first of all, I did not address this, but if he did give classified information, obviously 793 would apply. But I was trying to address a situation where a former Government official would not be in a total straightjacket insofar as the courts are concerned, and that the limitations imposed upon them timewise, subject matterwise, and others be reasonable.

I do not know what is reasonable in particular situations, and that is something the legislature will have to address.

Senator METZENBAUM. Let me ask you this. Assume as a hypothetical case that a State Department advisor at the Middle East desk were to resign tomorrow and take a job representing and advising a Middle East Government that is attempting to negotiate a foreign aid package with the administration.

How would current law apply?

Mr. KEENEY. Allen, do you want to answer that?

Mr. CARVER. Let me make a few assumptions, sir, and I will try to answer that. First, if this official participated personally and substantially in the matter by making specific recommendations, for example, on what approaches to take with the foreign government while working for the United States, or perhaps was involved somewhere sufficiently high in the organization to make a policy determination in connection with that matter, it very well may be a particular matter, which it is, involving specific parties; the foreign country certainly is a specific party at the time, as you have defined it.

The United States must have a direct and substantial interest in the matter, as you have described it. So this would give rise to a certain limitation and restriction on this official's actions after leaving the Federal Government, and that restriction would be a lifetime bar from representing that particular country with respect to that particular matter.

Senator METZENBAUM. With respect to that particular matter and, just as you said, with respect to, I think, the Department of Defense official before with respect to that particular matter, and

that becomes very sticky as to whether he is or is not involved in that particular matter.

The Senator's bill, which I am pleased to cosponsor, is far broader than that, far easier to bring a prosecution under.

Can you tell me of any cases that have been brought under the present law with respect to the situation that I described to you?

Mr. CARVER. With a foreign country?

Senator METZENBAUM. Yes.

Mr. CARVER. No, sir.

Senator METZENBAUM. And under S. 2334, there would be a prohibition and it would be a violation of law?

Mr. CARVER. It would appear so, yes, sir.

Mr. KEENEY. It would also be a very easily provable violation in the normal context, Senator. We can see that. That is not our problem with respect to it. If we had those facts and could demonstrate them, we would get a conviction, I am fairly confident.

Senator METZENBAUM. If you had the facts that this gentleman, whose name I am sorry I do not know—

Mr. KEENEY. Mr. Carver.

Senator METZENBAUM. Carver?

Mr. CARVER. That is Allen Carver, sir.

Senator METZENBAUM. Carver. I am sorry, Mr. Carver.

Take another hypothetical. Assume that a White House advisor for environmental issues resigns tomorrow to become a lobbyist for a company involved in toxic waste disposal. Although this advisor was intimately familiar with policy formulation in the toxic waste area, she or he had no official responsibility for that issue and participated only incidentally, not substantially, in the resolution of related problems.

Is that person permitted to perform the new job under current law?

Mr. CARVER. Yes.

Senator METZENBAUM. What about under S. 2334?

Mr. CARVER. Aiding and assisting, no, sir.

Senator METZENBAUM. No?

Mr. CARVER. If for compensation.

Senator METZENBAUM. If for compensation. Well, we can assume it was for compensation.

Mr. CARVER. Your bill would allow it without compensation.

Senator METZENBAUM. So we have two cases immediately where the new law would make it illegal to do that which is permitted under the present law, right?

Mr. CARVER. Yes, it would.

Senator METZENBAUM. Finally, assume that a Senate committee counsel responsible for energy issues were to resign this week and take a job in the public affairs department of Mobil Oil.

What restrictions would current law impose on his activities for his new employer?

Mr. CARVER. If in the context of 207—I would like to address it in that fashion. I cannot begin to speak to the whole realm.

Senator METZENBAUM. OK.

Mr. CARVER. As a public affairs officer, he would be permitted to go to work for that company and to act as their public affairs spokesman and take positions totally different from those taken

while working for the United States under current law, and could carry out secrets and provide that information as well, presumably, without a sanction under current law.

Senator METZENBAUM. So he could continue on, but under S. 2334 it would be illegal because it has a prohibition against Senate staff working on matters—

Mr. CARVER. Right, and assisting.

Senator METZENBAUM. Yes.

Mr. CARVER. Yes, sir.

Senator METZENBAUM. Then I am not quite certain that I understand the administration's position. Is the administration saying they can buy S. 2334, but have some concerns, such as the constitutional question? Overall, on the thrust of the legislation, is the administration supportive, or is it saying that section 207, I think it is, is sufficient at the present time, with possibly some minor amendments?

Mr. KEENEY. We were suggesting that we are in favor of the concept. We think that 207 can be expanded to cover most of the situations with which the chairman and you are concerned without raising serious constitutional issues.

Senator METZENBAUM. And you are saying that—give me the reasons why you want to make the modifications in 18 U.S.C. 207 instead of the changes as proposed by Senator Thurmond's bill.

Mr. KEENEY. Well, it is just the scope that we have been trying to address, Senator Metzenbaum. The scope of the chairman's bill is such, and the restrictions are so broad, that we have concerns about constitutionality.

Some elements of the Government have concerns that they are so sweeping that it will seriously interfere with the ability of the Government to get the best talent that is available to work in the Government. Those are the reasons.

Senator METZENBAUM. I think the latter point is a matter where I think the committee might strongly disagree with the administration because I think that many of us on this committee—and I cannot speak for all, but I think many of us feel that people are prepared to work for the U.S. Government, whether at the congressional level or at the administrative level, without the anticipation that at some point they will leave Government and go to work for the private sector in dealing with the very same issues that they dealt with when they were in the Government.

I think that is a difference in approach, and I think the fact of these three hypothetical cases I have you—does the administration believe that the activities that were described in those hypothetical cases should be allowed to continue?

Mr. KEENEY. We agree with what is being attempted here, that there should be some restrictions and control. Senator, there are some people who feel not that they should come into Government for the purpose of gaining a bonanza at the end of a certain period, but that they come into government with a feeling that they can advance through Government.

They can leave Government if they want, but they do not have to come with a restriction as to what their future may be from almost day one.

Senator METZENBAUM. Well, Mr. Keeney, you are a good example. It is my understanding you are in a career position with the Department of Justice.

Mr. KEENEY. Yes, sir.

Senator METZENBAUM. You have been there how long?

Mr. KEENEY. Thirty-five years.

Senator METZENBAUM. I think we all owe you a debt of gratitude for being there that long in government service. But it seems to me that if you wanted to go out into private practice when you take your retirement, there are many ways you could go out into private practice that would not violate S. 2334 and be very much of an asset.

Mr. KEENEY. That is true.

Senator METZENBAUM. You could certainly——

Mr. KEENEY. Well, at least I could go out and not violate the statute.

Senator METZENBAUM. Not violate the statute. Whether you are an asset, I suppose, is a question for somebody else to decide, but I am sure you would be

I think there are others here waiting to be heard and I think I have had enough, Mr. Chairman.

The CHAIRMAN. The distinguished Senator from Pennsylvania, Mr. Specter.

Senator SPECTER. Thank you, Mr. Chairman. Mr. Chairman, at the outset I compliment you for the introduction of this bill. It seems to me that this bill is a decided improvement over existing law because it is very plain and not subject to ambiguity. It bars a Federal employee from lobbying for 1 year and from working for a foreign entity for two years and also has a provision about high-ranking governmental officials not lobbying for a foreign government ever.

Mr. Keeney, you talk about a constitutional issue. Do you see a constitutional problem on the first two provisions of Senator Thurmond's bill which prohibit a Federal employee from lobbying the Federal Government for one year from leaving employment?

Mr. KEENEY. Not if you narrow it a little bit, Senator Specter, and cover the areas of the individual's expertise. But if you are going beyond that into areas that he has had no connection as a Government employee, I think you start getting into a troublesome area.

Senator SPECTER. On policy groups, perhaps we should, but why on constitutional grounds? Have you seen any cases which would raise a constitutional issue with that kind of a prohibition for a limited period like 1 year?

Mr. KEENEY. Well, I think the 1-year period is a good idea, and that is a factor that would be weighed by the courts when they are determining whether there was a serious restriction on the right of association and the right to make a living on the part of that individual.

I guess the short answer is a 1-year restriction does not create anywhere near the problem that a lifetime restriction does.

Senator SPECTER. All right. Now, how about the answer to my question? Have you seen any cases which raise a constitutional issue there?

Mr. KEENEY. I have not seen any that raise that specific issue, but I—

Senator SPECTER. I do not know of any. You find cases which raise an issue on employment contracts in the private contractual sense if you limit a person's right to compete. They are restraints on trade, but those are in a very, very different context.

I know of no case which says that there is a constitutional impediment to limiting a Federal employee from lobbying for somebody within a 1-year period.

Mr. KEENEY. But the example you give, the right to compete, is entirely different. What I was postulating was a situation where the individual was being proscribed from entering into an area and then lobbying the Congress with respect to an area that he had no connection with in the past.

Senator SPECTER. All right, but the law—

Mr. KEENEY. Senator, I am not necessarily saying that I am right on this. I am saying that there is an issue with respect to this and, you know, I think the Congress should address it.

Senator BIDEN. If the Senator will yield, what is the constitutional theory that you are—

Mr. KEENEY. Freedom of association, the right to make a living, Senator.

Senator SPECTER. I think the long and short of it, Mr. Keeney, is that you know of no case which raises that kind of an issue.

Mr. KEENEY. I know of no case that raises this specific issue.

Senator SPECTER. Well, I would be surprised, frankly, to find a constitutional impediment if you deal with as short a period as 1 year, which Senator Thurmond deals with. If you move from that to a prohibition from working for a foreign entity for 2 years after the individual leaves Government service, do you know of any case which raises a constitutional issue as to that?

Mr. KEENEY. I do not know of any case because there is no reason for any case to arise in that context, Senator. To the extent that you put restrictions on a person's right to associate, his right to speak out, his right to make a living, you are raising issues for the court, and that is all I am pointing out for you.

Senator SPECTER. It would seem to me that there are sufficient public policy considerations here which would weigh very heavily on a solid reason for this kind of a restriction.

When you come to a lifetime prohibition, I think you may be in a different area, but I personally think that when someone reaches the level of a Cabinet Secretary or the Director of the Central Intelligence Agency or positions of that level, it is not unfair to say that they are not going to be representing a foreign government in the future, because people of that level have just tremendous sway and tremendous entre.

So much of what goes on in Government is whom can you get to take the telephone call, whom can you get to see. Of people who attain the status of Cabinet officers or that level, I think it is fair to say that it is a lifetime prohibition.

But at least when you talk about that, you are in an area where maybe that could be limited to a term of years. I would say—

Mr. KEENEY. I would suggest also to the committee not only a term of years, but limiting to their area of expertise, which would

substantially enhance its constitutionality, or at least the arguments in favor of its constitutionality.

Senator SPECTER. But why limit it to areas of expertise? The real thrust of public concern—and I think that Senator Thurmond has put his finger on a great area of public concern—is unfair influence.

It is not a matter of what someone knows about. The case in controversy today is one where there is a general conclusion that there is no real area of expertise, but it is just a matter of knowing people or having unusual sway, which does not relate to any specific technical information.

When you talk about conflict of interest, you talk about knowledge or specifics which put a person in a way to benefit for another party from their original principal's interest. But I think we are looking at something really very different here.

We are looking at a concern for influence-peddling which arises from prestige unrelated to specific duties.

Mr. KEENEY. Senator, I concede that that goes into the balance when you are determining reasonableness. I do not argue with you at all on that. All I am trying to present to the committee is a sense that the statute that you enact has to ultimately meet the test of reasonableness.

Maybe you are right; maybe they have such an influential position in Government that the ban is acceptable. I have reservations.

Senator SPECTER. I would think so on public policy grounds. That would be a congressional determination of the seriousness of the issue.

Let me move from that line of questioning, Mr. Keeney, to a line which Senator Biden was discussing with you about the prosecution of cases. The current law requires in one part that the Government employee participated "personally and substantially" while a Government employee.

It seems to me that the difficulty of establishing what "personally and substantially" means, or at least what "substantially" means, would be a significant impediment, if a prosecutor is looking at a given set of facts, to discourage him from bringing a case.

Mr. KEENEY. With respect to a specific matter, yes.

Senator SPECTER. Yes. What does "substantially" mean?

Mr. KEENEY. Well, it depends on the facts as to whether or not you can demonstrate to the satisfaction of a court and jury that the participation in that specific matter was substantial, and that is—

Senator SPECTER. I did not hear all of the exchange that you had with Senator Biden. I know you covered ground generally that the U.S. attorneys have declined prosecutions in a number of cases which might have been brought under section 207, is that correct?

Mr. KEENEY. That is right.

Senator SPECTER. Well, have those declinations arisen because of the difficulty of defining what substantially means?

Mr. KEENEY. In part. Senator, I have not looked back at those cases. I am familiar with a limited number of them, but that obviously would be a problem in prosecuting any of the cases—substantiality, personal participation, and specific matter.

Specific matter, again, gets us into a very difficult area.

Senator SPECTER. Well, that is the advantage which Senator Thurmond's bill has, and that is it just flat out says a Federal employee cannot lobby the Federal Government for 1 year after leaving service. It does not have any of those words of ambiguity that the district attorneys have a hard time defining or that defense lawyers can argue about.

Mr. KEENEY. I agree. Senator, as I said before, we would find those cases under Senator Thurmond's bill much easier to prosecute.

Senator SPECTER. And the same thing as to 2 years for lobbying for a foreign government, so that when you move away from those qualifying considerations which try to delimit expertise or circumstances, you gain a lot by way of clarity, and fairly so, putting people on notice that there is a flat prohibition.

There is greater fairness to a former employee because he knows exactly what he can and cannot do. He does not have to hire a lawyer to tell him what personally and substantially means.

Mr. KEENEY. That is right. Anybody can read the statute and know that his conduct is covered. That is a real virtue of the statute.

Senator SPECTER. Senator Metzenbaum covered this to an extent, but I take it, after reading your statement, that the position of the administration is that there ought to be modifications to existing law.

Mr. KEENEY. Yes.

Senator SPECTER. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The distinguished Senator from Alabama.

Senator HEFLIN. I was reading over various parts of your testimony here. I'd like to learn some of the rationale behind section 207: First, the Government wanted to minimize the potential risk from a former employee using inside information to the detriment of the Government.

Second, Congress wanted to safeguard Federal funds by preventing a former employee from profiting by his or her knowledge about the money owed by the United States. Third, Congress wanted to minimize the potential risk of a former employee exercising continuing personal influence over his or her former associates.

Now, these, of course, are directed toward claims which have been made. It bothers me that we have areas in which certain officials have classified information involving the security of the United States, and those same officials at a later time can or may represent foreign governments, or they could become involved as officers or as directors of companies which have multinational investments.

The information that they might have, which continues to be classified and continues to be sensitive for the security of the United States is knowledge—whether revealed or not—with which they can make recommendations as to decisions which could affect the security interests of the United States.

Now, in that category we could include various officials of the CIA, the President's national security staff, various officials of the Department of Defense, some military officers, and other people.

Now, I wonder if this is an area that we should look to with the potential of precluding those officials of the Government who have such sensitive information from ever being placed in a position where, for pecuniary gain, they might use such information in a way that could be harmful to the United States.

In other words, because of their status and access to information, should there be, in effect, a lifetime preclusion from becoming involved with certain specified organizations?

I just wondered if you wished to comment on that.

Mr. KEENEY. Well, Senator, when you are dealing with highly classified material which continues to be classified, I mean there is a concern. If we cannot prove that, you know, it is an unauthorized disclosure of information to the foreign government, we cannot prosecute under those statutes.

So I mean you are pointing up a situation of concern, undoubtedly, and if unscrupulous individuals are going to, in effect, betray their country by giving this information to a foreign government, if we can do something about it I think we should.

Senator HEFLIN. Well, I am approaching it not that there was any revelation; but rather that there was, in effect, an inner working of the mind or use of the knowledge that enabled the proper and the right recommendation to be made to the foreign government without revealing the information itself.

Mr. KEENEY. Based on the expertise and knowledge of the—

Senator HEFLIN. Expertise that he has, the information that he knows is sensitive. He does not reveal it, but nevertheless he is in a position where he makes a recommendation that he does not have to justify to the foreign government or to his multinational company, or wherever his pecuniary gain is coming from.

He does not reveal the information, yet information that he has is used, and it could well affect the security interest. I mean, there are so many scenarios of fact that could be set forth that I wonder whether or not the best course of action is, because of the position that a person has held and the sensitivity of the information that they have, to just preclude them from any such representation or such position in order to better serve the interests of the United States.

Mr. KEENEY. Well, I understand where you are coming from, Senator Heflin. You know, it certainly would be desirable to preclude them, and certainly desirable, and I think proper, to preclude them for a period of time. I just have a problem with a total ban, lifetime.

Senator HEFLIN. Well, I mean I am discussing this out loud; I am not recommending.

Mr. KEENEY. Yes.

Senator HEFLIN. Obviously, matters continue for long periods of time; matters probably never get declassified. It is a problem that just worries me and I am really just throwing it out for discussion.

Maybe we do not shed any light. Maybe we do not find a perfect cure for it, but maybe we can minimize the ill application of it.

If you have any other thoughts on it—

Mr. KEENEY. No, Senator. I am totally in sympathy with what you are saying. I just have a concern about a lifetime ban, and I would hope that we can all come up with a suggestion somewhere in between that would be reasonable and acceptable to the courts as well as accomplishing what you are trying to accomplish.

Senator HEFLIN. That is all.

The CHAIRMAN. Thank you very much.

The distinguished Senator from Iowa, Mr. Grassley.

Senator GRASSLEY. Well, thank you, Mr. Chairman. First of all, I want to apologize for being delayed. I was at the Finance Committee. But I want to commend you for the aggressive fashion in which you are pursuing this issue, and I am particularly sorry that I missed the remarks of my colleagues, Senators Pryor and Boren.

I understand that they pointed out some of the additional problems in this area, particularly in the military industrial complex. I would like to just say that I have cosponsored and supported tougher revolving door laws in the defense industry, proposals which have normally faced tough sledding in the legislative process.

So I am hopeful, Mr. Chairman, that we on this committee can move forward with a bill that will have a noticeable impact on the revolving door problem, be it lobbying or contract negotiations.

Mr. Keeney, you have indicated that one reason many conflict of interest or so-called revolving door cases are not brought is due to the belief that these cases have no jury appeal. I would like to get that clarified.

Are you saying that the public does not believe that we should have criminal laws in this area?

Mr. KEENEY. I am not prepared to go that far, Senator Grassley. What I am saying is that what we have now—the statutes are so complex and the borderline between criminality and ethical misconduct sometimes gets so close that we have difficulties getting convictions.

Senator GRASSLEY. Well, then could I ask you, would you think that we would have greater enforcement, then, if we had personal civil liability for these situations—for example, a civil forfeiture of \$10,000 or \$50,000, or any figure you might want to think of?

Mr. KEENEY. Senator, as a matter of general philosophy, I personally believe that civil sanctions are appropriate; not in lieu of criminal sanctions, but the availability of civil sanctions makes law enforcement generally more effective.

Senator GRASSLEY. OK, then I would also like to bring up the situation that I would term reverse revolving door, and let me explain that that would be where an employer, knowing that an employee is going to leave that company for Government service, gives the departing employee a hefty severance payment, something for him or her to remember the company by.

Are these situations covered by current law?

Mr. KEENEY. Yes; that one is, Senator, but only if you make some assumptions. If the intent of the employer was to make up for the difference between what the employee was earning with the company and what he would earn with the Government, 18 U.S.C. 209 would cover that situation.

If it was a straight bonus that was naturally given at the termination of the employment, it would not be a violation.

Senator GRASSLEY. Have there been any successful prosecutions in that area?

Mr. CARVER. To answer your question, sir, there have been, but almost entirely, to my knowledge, in plea-bargaining situations. Usually, they come up in cases involving bribes.

Senator GRASSLEY. I would like to point out that it is my understanding the situation I described arose when five high-level Defense Department employees who were formerly employed by Boeing received very large payments before going to work for the Government. And in that particular case, the Defense Criminal Investigative Service and the Department of Justice investigated for nearly 2 years before finally declining to prosecute any of those individuals.

So do we need stronger laws in this particular instance?

Mr. KEENEY. The problem in that particular situation was the proof of intent on the part of the individuals. There were five individuals and the proof varied as to each and every one of them. The proof varied with respect to the company itself as to which we conceivably could have prosecuted.

The bottomline conclusion in that case was that we could not successfully prosecute.

Senator GRASSLEY. So then your feeling is the law is adequate?

Mr. KEENEY. The law is inadequate?

Senator GRASSLEY. No; the law is adequate. I mean, that is the conclusion I draw.

Mr. KEENEY. Well, in that particular situation, we did not think prosecution was appropriate or that we could persuade a jury that it was appropriate. That is what it comes down to, Senator.

Senator GRASSLEY. Thank you, Mr. Chairman.

Mr. KEENEY. In a more egregious situation, presumably we would have gotten a conviction.

Senator GRASSLEY. Mr. Chairman, I thought I was done, but let me just ask as a followup, should we have civil laws in that area to avoid intent problems?

Mr. KEENEY. We do have a civil law in that area.

Senator GRASSLEY. In the area I described in the case of the five Boeing—

Mr. KEENEY. Yes; there is a civil provision.

Senator GRASSLEY. OK. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator

Thank you, gentlemen, for your presence, and we appreciate your being here.

Mr. KEENEY. Thank you, Mr. Chairman.

Mr. CARVER. Thank you, Mr. Chairman.

The CHAIRMAN. I have a few questions I would like for you to answer for the record, Mr. Keeney. I will send them to you for your response to be inserted in the record.

Mr. KEENEY. Very good, Mr. Chairman.

[The prepared statement follows:]



Department of Justice

STATEMENT

OF

JOHN C. KEENEY
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

REVOLVING DOOR LEGISLATION

ON

APRIL 29, 1986

Mr. Chairman and Members of the Committee, I am pleased to be here today to present the views of the Department of Justice on the operation of one of the conflict-of-interest statutes, 18 U.S.C. §207 and on S. 2334, a bill which would substantially amend Section 207.

Policy Objectives of Section 207 of Title 18, United States Code

Section 207 of Title 18, United States Code, was enacted in 1962 as part of a comprehensive statutory scheme ^{1/} which evolved from a number of conflicts-of-interest statutes enacted by Congress more than a century ago in the wake of revelations of rampant corruption in connection with the procurement of goods and services and the handling of claims against the United States during the Civil War. In 1872, legislation was passed which prohibited a former employee of a department of the executive branch from acting as counsel, attorney, or agent for a period of two years after leaving office in the prosecution of claims pending in the department at the time the former employee worked there. ^{2/} Three principal policy considerations supplied much of the motivation for the enactment of this legislation: ^{3/} first, Congress wanted to minimize the risk that a former employee would use inside information about a claim to the detriment of the government; second, Congress wanted to safeguard federal funds by preventing a former employee from profiting by his or her

^{1/} Pub.L. 87-849 (76 Stat. 1119, October 23, 1962).

^{2/} Act of June 1, 1872, ch. 256 §5, 17 Stat. 202.

^{3/} See Cong. Globe, 42d Cong., 2d Sess. 1584, 1846-47, 3109-13, 3135 (1872).

knowledge about monies owed by the United States; and third, Congress wanted to minimize the risk that a former employee would exercise a continuing personal influence over his or her former associates.

These early policy considerations, and others similar to them, provided the impetus for the enactment of the major revision to Federal bribery and conflicts-of-interest laws in 1962. 4/ According to the House Report which accompanied the 1962 legislation: 5/

The proper operation of a democratic government requires that officials be independent and impartial; that Government decisions and policy be made in the proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government. The attainment of one or more of these ends is impaired whenever there exists, or appears to exist, an actual or potential conflict between the private interests of a Government employee and his duties as an official. The public interest, therefore, requires that the law protect against such conflicts of interest and establish appropriate ethical standards with respect to employee conduct in situations where actual or potential conflicts exist.

It is also fundamental to the effectiveness of democratic government that, to the maximum extent possible, the most qualified individuals in the society serve its government. Accordingly, legal protections against conflicts of interest must be so designed as not unnecessarily or unreasonably to impede the recruitment and retention by the Government of those men and women who are most

4/ See n.1, *supra*.

5/ H.R. Rep. No. 748, 87th Cong., 1st Sess. 5-6 (1961).

- 3 -

qualified to serve it. An essential principle underlying the staffing of our governmental structure is that its employees should not be denied the opportunity, available to all other citizens, to acquire and retain private economic and other interests, except where actual or potential conflicts with the responsibility of such employees to the public cannot be avoided.

Likewise, one prominent commentator has noted the following policy objectives of the 1962 legislation: 6/ (1) impartiality, fairness and equality of treatment toward those dealing with government; (2) assurance that decisions of public importance will not be influenced by private considerations; (3) efficiency and economy in carrying on the business of government; (4) maintenance of public confidence in government; and (5) prevention of the use of public office for private gain. Section 207 of Title 18, United States Code was a major component of the 1962 legislation. Substantial amendments were made to Section 207 by the Ethics in Government Act of 1978; 7/ the section was amended again in 1979. 8/

The Senate Report 9/ accompanying the 1978 amendments notes that Section 207 is designed to ensure government efficiency, eliminate official corruption, promote evenhanded exercise of administrative discretion, prevent use of undue influence over former colleagues, and prevent use of information about

6/ R. Perkins, The New Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113, 1118 (1963).

7/ Ethics in Government Act of 1978, Pub. L. 95-521, §501(a), 92 Stat. 1864.

8/ Act of June 22, 1979, Pub. L. 96-28, §§1, 2, 93 Stat. 76.

9/ S.Rep. 95-170, 95th Cong., 1st Sess. 31, 34 (1977).

- 4 -

specific cases gained during government service for a former employee's own benefit and that of private clients. The object of the statute is to promote honest government, and impartial decisions, and to prevent corruption and other official misconduct before it occurs, as well as penalizing it once it is found.

An Overview of Section 207

There are four subsections in Section 207 of Title 18, United States Code, which provide for felony sanctions upon a conviction: §§207(a); 207(b)(i); 207(b)(ii); and 207(c). Each of these subsections provides for a maximum sentence of a fine of not more than \$10,000 or imprisonment for not more than two years, or both, but 18 U.S.C. §3623 substantially increases the maximum fine for individuals for offenses committed after December 31, 1984.

Subsection 207(a) and subsection 207(b)(i) each covers all former officers and employees, including special Government employees, of the executive branch, independent agencies, and the District of Columbia, except such officers and employees who left government employment before July 1, 1979. ^{10/} Subsection 207(b)(ii) and subsection 207(c) each covers persons as set forth in subsection 207(d), except such persons who left government employment before July 1, 1979, or, in the case of such persons

^{10/} Those officers or employees who left their employment prior to July 1, 1979 remain subject to 18 U.S.C. §207(a) (1976) which provides:

Whoever, having been an officer or employee of the executive branch of the United States

who occupied designated positions, prior to the effective date of such designation. In addition, subsection (c) does not cover a special government employee who serves for less than sixty days in a given calendar year.

Specific exceptions to the applicability of subsections 207(a), 207(b)(1) and 207(b)(11) are set forth in subsection 207(f). Likewise, exceptions to the applicability of subsection 207(c) are set forth in subsections 207(d)(2), 207(e), 207(f), 207(h), and 207(i).

Generally, Subsection 207(a) prohibits, for the life of a matter, a person subject to its terms from representing anyone except the United States in a Federal forum or before a Federal official in connection with any particular matter involving a specific party or parties in which the United States or the

(Footnote Continued)

Government, or any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for anyone other than the United States in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, while so employed

Shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.

- 6 -

District of Columbia is a party or has a direct and substantial interest, and in which the person participated personally and substantially as an official.

Subsection 207(b)(1) prohibits a person subject to its terms from representing anyone except the United States in a federal forum or before a federal official in connection with a particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and which particular matter was actually pending under the former official's official responsibility as an such an official within a period of one year prior to the termination of such responsibility. This prohibition is limited to the two years following a former official's employment or, in cases where the former official's responsibilities changed before the official left government service, the two years following the change.

Subsection 207(b)(11), for two years after their government employment has ceased, bars persons subject to its terms from representing, aiding, counseling, advising, consulting, or assisting in representing anyone except the United States by personal presence at any formal or informal appearance before a federal forum or official, in connection with particular matters involving a specific party or parties in which they participated personally and substantially as government officials.

Subsection 207(c), unlike subsections 207(a), 207(b)(1) and 207(b)(11), embraces particular matters which do not involve specific parties and which arise after the former officer or

- 7 -

employee has left government service. The subsection, in general, prohibits persons subject to its terms from representing anyone except the United States before the agency where such person served in connection with any particular matter which is pending before such agency or in which such agency has a direct and substantial interest.

In addition to its four felony provisions, section 207 includes a misdemeanor provision which regulates the conduct of partners of officers or employees of the executive branch, independent Federal agencies and the District of Columbia, including special Government employees. Such partners are barred from acting as agents or attorneys for anyone except the United States before certain Federal forums, or officers or employees thereof, in connection with a particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which such officers or employees participate or have participated personally and substantially as officers or employees or which is the subject of their official responsibility. The statute provides that an offense under this subsection is punishable by a fine of not more than \$5,000 or imprisonment for not more than one year, or both, but 18 U.S.C. §3623 substantially increases the maximum fine for individuals for offenses committed after December 31, 1984.

Lastly, subsection 207(j) establishes a basis for administrative disciplinary action, pursuant to regulations promulgated under the authority of the subsection, and following a

determination by the head of a department or agency in which the former officer or employee served that such former officer or employee violated subsection 207(a), 207(b)(1), 207(b)(11) or 207(c).

Compliance With Section 207

The Criminal Division has no evidence which demonstrates that section 207 violations are a significant law enforcement problem. Indeed, the rather sparse number of section 207 investigations and prosecutions reported to the Executive Office for United States Attorneys by the United States Attorneys for the period 1980 through February 1985 would suggest that such offenses occur infrequently. In that five year period, 45 matters involving section 207 issues were reported by the United States Attorneys as closed without prosecution. Nine of these declinations resulted from referrals which were made prior to 1980. In this same period, five section 207 prosecutions were initiated, according to the reports of the United States Attorneys. Three of these prosecutions resulted in guilty pleas. One prosecution resulted in an acquittal. The fifth prosecution was dismissed at the request of the United States Attorney.

Likewise, the Criminal Division's Public Integrity Section's recent experience with matters involving section 207 indicates that there is no widespread failure to comply with the statute. In this regard, the Section received approximately fifty-one referrals of matters involving section 207 in the

- 9 -

period 1980 through February 1985. Criminal prosecution was declined in each of these matters. The Public Integrity Section handled two of these referrals, which involved former Department of Justice attorneys, under the provisions of subsection 207(j), and is currently processing another matter involving a Department of Justice employee under 207(j).

Enforcement of Section 207

Crime prevention is a major goal of law enforcement. The Office of Government Ethics (OGE) complements the Criminal Division's enforcement of the federal criminal conflicts-of-interest statutes by facilitating understanding among executive branch officials about what the statutes require from them. Such understanding minimizes the risk that an inadvertent offense will be committed. The OGE endeavors to assure that executive branch officials are aware of their responsibilities under the statutes by developing regulations and policies concerning the statutes, issuing advisory opinions about the statutes, reviewing the financial disclosure reports of Presidential nominees, monitoring the adequacy and effectiveness of federal agency ethics programs, and sponsoring training conferences for agency ethics personnel. The Public Integrity Section of the Criminal Division helps the OGE effectively to perform its advisory function by consulting with it, for example, about questions involving statutory construction. The Section, moreover, has twice provided briefings for the OGE staff about the Section's view of the statutes and the manner in which such matters are ordinarily process in the criminal justice system and participated in a seminar concerning the

conflicts-of-interest statutes with OGE officials in October 1985. An objective of such a dialogue is to assure effective coordination between the advisory and prosecutive components of the executive branch.

There is a Memorandum of Agreement, effective May 19, 1980, between the OGE, the Office of Legal Counsel (OLC) and the Criminal Division. This memorandum provides in part that the Director, OGE, shall consult with the Criminal Division before rendering an advisory opinion on an actual or apparent violation of any conflict of interest law. Should the Criminal Division decide to undertake a criminal investigation, the Director will not render an advisory opinion pending a determination by the Criminal Division not to prosecute.

In summary, the Criminal Division's Public Integrity Section and the OGE have an informal but close relationship regarding the prevention of conflicts-of-interest offenses.

Disciplinary action pursuant to subsection 207(j) is of major importance in the effective enforcement of section 207. Most section 207 violations which we have seen have involved conduct totally unsuited for criminal prosecution, but which might be redressed effectively by means of an administrative sanction commensurate with the seriousness of the conduct.

The potential for criminal prosecution under section 207 enhances enforcement by providing a general deterrent against the conduct the statute is designed to prevent. Allegations of section 207 offenses are investigated mainly by the various Inspectors General, or the Federal Bureau of Investigation or

- 11 -

both. Section 207 matters referred to a United States Attorney's office or to the Public Integrity Section are ordinarily handled by the receiving office. Likewise, prosecution determinations are made by the receiving office. A chapter in the United States Attorneys' Manual, which was drafted in the Public Integrity Section, includes an overview of section 207 for the benefit of federal prosecutors who are called on to review a section 207 matter. 11/

S. 2334, The Integrity in Post-Employment Act of 1986

We share the concerns expressed by the Chairman in his recent statement on the floor of the Senate regarding the introduction of The Integrity in Post-Employment Act of 1986, and are prepared to work with the Committee in achieving your objectives. Unfortunately, we only received the bill at the end of the day last Monday and have not had time to develop many constructive suggestions for improvements in the bill.

Based on our analysis to date, we have some reservations about the bill in its present form. We do believe, however, that we should build on the present 18 U.S.C. §207.

11/ 9 USAM §§ 85.200 through 85.206; 85.240 through 85.249 b.

S. 2334 would eliminate three felony provisions from 18 U.S.C. §207 (subsection 207(b)(1), 207(b)(11), and 207(c)). We do not believe that there is any reason to eliminate these prohibitions which contain important and necessary rules governing the post-employment activities of government officials.

The above provisions cover situations (1) where a particular matter was pending under the former official's responsibility -- a two-year bar; (2) where there has been substantial and personal involvement by the former official in a specific matter -- a two-year bar; and (3) communications and appearances before the former official's agency with intent to influence -- a one-year bar.

Section 207 could be amended to clearly proscribe non-representational activity, such as behind the scenes advice, which is not currently covered by Section 207. We would also be pleased to work with the Committee on appropriate language to extend §207 to other branches of government.

Mr. Chairman, that concludes my prepared remarks and I would be happy to attempt to answer any questions you may have.



U.S. Department of Justice

Criminal Division

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

MAY 22 1986

Dear Mr. Chairman:

Thank you for your April 30, 1986, letter requesting my responses to your questions concerning S. 2334 (The Integrity in Post Employment Act of 1986). My responses are provided below.

- I. Do we believe that terms used in 18 U.S.C. § 207, such as "particular matter," "personally and substantially," and "under the official responsibility" are ambiguous and difficult to apply in a criminal setting?

This question first asks whether we believe that 18 U.S.C. § 207 uses ambiguous language. In our opinion, the language in the statute is not ambiguous. The terms used in section 207 are common words of universal usage. ^{1/} They are not exotic or abstruse words, requiring detailed etymological study or judicial analysis.

The terms, furthermore, are discussed in considerable detail in 5 C.F.R. Part 737. ^{2/} In addition, the Office of Government

^{1/} Of course "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979); see generally 2A Sutherland Statutory Construction §§47.28-47.31 (Sands ed.).

^{2/} 5 C.F.R. Part 737 comprises the post-federal employment regulations of the Office of Government Ethics ("OGE"). The regulations have been approved by the Attorney General and are applicable to all agencies of the Executive Branch. The interpretation given by an agency to a statute it administers is
(Footnote Continued)

Ethics ("OGE") has issued numerous opinions interpreting these terms. These opinions are available to the public from the OGE. Likewise, the Office of Legal Counsel of the Department of Justice has published opinions interpreting these terms. ^{3/} Several of the terms, moreover, are discussed in published judicial opinions. See for example, United States v. Nasser, 476 F.2d 1111 (7th Cir. 1973) (in a case involving section 207's predecessor, 18 U.S.C. §207 (1964), the Seventh Circuit upheld the constitutionality of the statute, rejecting arguments that the statute violated the due process clause of the Fifth Amendment because of vagueness, was a bill of attainder in violation of Article I, Section 9 of the Constitution, and was an ex post facto law in violation of Article I, Section 9 of the Constitution); United States v. Irons, 640 F.2d 872 (7th Cir. 1981) (in a case involving 18 U.S.C. §208, the Seventh Circuit, relying in part on United States v. Conlon, 202 U.S. App. D.C. 150, 628 F.2d 150 (1980), rev'g in part, United States v. Conlon, 481 F. Supp. 654 (D. D.C. 1979), rejected an argument that broadly construing the "or otherwise" language appearing in section 208 [appearing also in section 207] would render the section unconstitutionally vague); and United States v. Dorfman, 542 F. Supp. 402 (N.D. Ill. 1982) (the district court concluded that official responsibility could not be avoided by means of a recusal).

(Footnote Continued)

entitled to considerable deference. See, e.g., Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 (1981); Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978); Udall v. Tallman, 380 U.S. 1, 16 (1965). The OGE is responsible for issuing advisory opinions interpreting federal conflicts of interest statutes. 5 C.F.R. §737.1(c)(8).

^{3/} See for example John M. Harmon's Memorandum Opinion for the Chief Counsel, Food and Drug Administration (OLC 78-37), dated June 29, 1978, published in Opinions of the Office of Legal Counsel of the United States Department of Justice, Vol. 2 (January 11, 1978 - December 31, 1978). This opinion discusses the meaning of the term "particular matter." Although the discussion is in the context of 18 U.S.C. §208, it plainly is pertinent to section 207 since it is fundamental that "[t]he connotation of a term in one portion of an Act may often be clarified by reference to its use in others," United States v. Cooper Corp., 312 U.S. 600, 606-607 (1941). Although amended by the Ethics in Government Act, section 207 was enacted originally in 1962 as part of a comprehensive statutory scheme which included 18 U.S.C. §208, Pub. L. No. 87-849 (76 Stat. 1119, October 23, 1962).

Lastly, the Congress has provided some guidance helpful in determining the meaning of these terms. See for example, S. Rep. No. 170, 95th Cong., 1st Sess. (1977). See also H.R. Rep. No. 748, 87th Cong., 1st Sess. (1961) and S. Rep. No. 2213, 87th Cong. (1962).

In summary, the terms used in section 207 are plain enough. In addition, they have been employed in the modern conflicts of interest statutes for over twenty-two years and in that period have been construed in numerous factual contexts both administratively and judicially. Under these circumstances, we believe that these terms are not ambiguous.

Turning to the second part of your question, whether the terms are difficult to apply in a criminal setting, we believe that the terms are no more nor less difficult to apply in criminal prosecutions than the various terms which are employed throughout the federal criminal code. Indeed, where criminal prosecution is appropriate, we are usually able to prosecute conflicts of interest cases successfully. 4/ Inevitably there will occur factual settings presenting difficult questions of statutory construction. This is so with respect to section 207 just as it is with most of the federal statutes employed in public integrity cases (see, for example, 18 U.S.C. §§371, 1341, 1503, 1505, 1951 and 1962).

II. Does the language of S. 2334 more clearly than the language of section 207 indicate what would be expected of federal employees leaving government service?

Yes, but at the expense of creating an overbroad criminal measure which would proscribe questionable, innocuous and beneficial contacts alike.

4/ Recent prosecutions involving these terms are, for example, United States v. Fred A. Mitchell, Crim. No. CR 4-85-128 (N.D. Tex.) (former Regional Director of the Office of Oversight, General Services Administration, pleaded guilty to violating 18 U.S.C. §208 and is awaiting sentencing); United States v. Paul Gorman, Crim. No. 84-752 (N.D. Ohio) (former Assistant United States Attorney convicted by a jury for violating 18 U.S.C. §208 and for accepting an illegal gratuity in violation of 18 U.S.C. §201(g)); United States v. Thomason, Crim. No. 85-P-0037-NE (N.D. Ala) (former Deputy Director, Science and Engineering Directorate, Marshall Space Flight Center, NASA, pleaded guilty to one violation of section 208 and four violations of 18 U.S.C. §1001 (making false statements)).

111. Would the language of S. 2334 be easier to apply in a criminal setting than the language in 18 U.S.C. §207?

Whether or not the language of S. 2334 would be easier to apply in a criminal setting than the language in 18 U.S.C. §207 would depend on the facts and circumstances of a particular case. For example, the language in section 207 would be easy to apply to a situation involving a lawyer who handled a case for an executive branch agency as its attorney one day, then resigned and appeared in federal court representing another party in the case soon after leaving federal service; whereas the language in S. 2334 would be difficult to apply in a case involving a person who worked for a federal agency as a truck driver, resigned, then represented a foreign friend residing abroad for reimbursement of out-of-pocket expenses before the Immigration and Naturalization Service within two years after leaving federal employment.

In addition, S. 2334 in most cases would require proof of compensation, financial gain or other remuneration. 18 U.S.C. §207 requires no such proof.

IV. What procedures are followed in the investigation and prosecution of an "ethics violation"?

Ethics violations are dealt with administratively by the various departments and agencies of the Government within the framework of their own regulations, practices and procedures. The federal criminal conflicts of interest laws are enforced by the various United States Attorneys and the Criminal Division of the Department of Justice.

Investigations based on allegations or hard evidence of criminal conflicts of interest offenses are conducted like any other criminal investigation. The main objective is to collect facts sufficient to demonstrate that an offense has been committed, no offense has been committed, or there is insufficient evidence to resolve the question of whether or not an offense has been committed.

A determination about how best to conduct an investigation ordinarily is made on an ad hoc basis taking into account a number of factors, such as, for example:

- (1) the specificity of the facts upon which an allegation is based;
- (2) the credibility of the source of the allegation;
- (3) whether the alleged crime is a past event or is ongoing; and

- 5 -

(4) the availability of investigative resources.

Investigations typically involve one or more of the following operations: collecting, examining and evaluating pertinent documentary materials, using executive branch investigative agencies (the Federal Bureau of Investigation, Internal Revenue Service, Inspectors General, and so forth); subpoenaing documentary materials, using grand jury subpoena power; interviewing witnesses, using executive branch investigative agencies; and questioning witnesses before a grand jury.

Investigations resulting in the referral of a matter to a prosecutor for evaluation and guidance, typically involve a prosecutive determination, that is, a decision about whether or not the evidence collected during the investigation is sufficient to prove that a crime was committed and the accused committed it; or whether or not the evidence is inconclusive, and if so, whether or not the investigation should be continued or closed; or whether or not the evidence demonstrates that no crime was committed.

A conflict of interest offense resulting in criminal prosecution is prosecuted much like any other federal crime would be prosecuted. The case may be resolved by a plea agreement executed either before or after an indictment is returned, or information is filed. 5/ After an indictment has been returned, or an information has been filed, the prosecution would proceed as set forth in the Federal Rules of Criminal Procedure and the local rules of the district court where the prosecution is held.

V. Is the one-year prohibition set forth in section 2(b)(1) of S. 2334 unconstitutional?

Section 2(b)(1) would prohibit former officers or employees of the United States, for a period of one year after termination of employment, from making any oral or written communication with any government agency on behalf of another person for compensation. The constitutionality of this provision is, we believe, not entirely free from doubt. The Supreme Court has recognized a right in individuals to follow a chosen trade or profession, a right that is protected from arbitrary government abridgement by the Due Process Clause of the Fifth Amendment. See Green v. McElroy, 360 U.S. 474, 492 (1959); Schwartz v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957). The extent to which this

5/ 18 U.S.C. §209 is a misdemeanor; therefore, prosecution could be undertaken by filing an information. Rule 7, Federal Rules of Criminal Procedure.

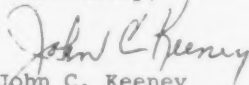
- 6 -

right may be entitled to constitutional protection depends upon the seriousness of the individual's injury and the importance of governmental interest at stake. See Cafeteria Workers v. McElroy, 367 U.S. 886 (1961). Thus, in a case where an individual was effectively barred from practicing his profession as a result of the government's revocation of his security clearance, without affording him notice of the charges against him or an opportunity to rebut them, the Court found that he had been denied his constitutional rights. See Green v. McElroy, *supra*, 360 U.S. at 496-97. By contrast, in a case where an individual terminated from her federal employment for security reasons was free to obtain employment elsewhere, and where the action taken was in the course of "the Federal Government's dispatch of its own internal affairs," the employee was held not constitutionally entitled to notice and a hearing prior to termination. See Cafeteria Workers v. McElroy, *supra*, 367 U.S. at 898.

We can conceive of circumstances in which it could be argued that the provision in section 2(b)(1) effectively deprives a former government employee of the right to practice his or her chosen profession for a year in violation of the Fifth Amendment. This argument would draw strength from any perceived or real lack of nexus between the broadly proposed limitation in section 2(b)(1) and the asserted governmental need to protect against the misuse of information or influence. While we are unable to say definitively that this particular provision of the bill is unconstitutional, ^{6/} the seriousness of our concern merits, we believe, consideration of a more narrowly drawn prohibition that might be both more effective and enforceable.

If I may be of any further assistance to the Committee, please contact me.

Sincerely,



John C. Keeney
Deputy Assistant Attorney General
Criminal Division

^{6/} The constitutional concern that we have pointed out in connection with section 2(b)(1) would seem stronger in connection with section 2(c), which contains a lifetime bar on former high government officials representing, advising, or "assist[ing] in any way" a "foreign entity."

The CHAIRMAN. The Honorable David Martin, Director of Government Ethics, Office of Personnel Management, Washington. Mr. Martin, if you will come around, I will ask you two or three questions now and I may have some others for the record.

Mr. Martin, today we have had testimony on the legal aspects of my bill and current law. Now, if we can get away from that and talk about what is going on in the real world, Mr. Martin, you are the chief ethics officer for the executive branch.

Would you tell us how you feel about the current situation? Is there a problem with either actual or the appearance of access or influence peddling?

STATEMENT OF DAVID H. MARTIN, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, OFFICE OF PERSONNEL MANAGEMENT

Mr. MARTIN. Well, Mr. Chairman, if I could answer that question by giving you my unprepared remarks, which I think will cover an answer to that question in those remarks, let me start by saying that I also think that you have done a commendable thing in introducing your legislation and putting your effort to an issue that I think is quite troubling.

It is important to protect the integrity of the decisionmaking process in Government—

The CHAIRMAN. Speak in your microphone there a little closer, if you will.

Mr. MARTIN [continuing]. And the appearance that is created when there is a possibility that the integrity of the Government and its decisionmaking process is affected.

But I think in order to put the problem in perspective, we need to talk about two kinds of things. One is the revolving door—that is, the traditional postemployment problem—and the antilobbying provisions, and I think your bill points in that direction.

They both have the same implications: One, a loss of independence or judgment by Federal employees; a negative effect on morale when employees switch sides, especially at high levels; implications of unfair advantage; implications of mismanagement or fraud; the appearance of wrongdoing; the use of nonpublic information, sensitive information not available to the public; and the use of personal influence to affect Government decisions.

These and similar perceptions and arguments have created support for new legislation directed to these things. How real are the perceived problems? The answer, in my view, depends upon the measure that one uses.

One measure is what do people believe. Your proposal and others indicate that perceptions are a significant part of political reality in this, as in other subject areas. By this measure—and this, I think, answers your question, Mr. Chairman—the revolving door or the lobbying problem are real problems.

The second measure is specific, verifiable evidence of wrongdoing and harm done. By this measure, the perceived problem is difficult to identify and to define. Therefore, I say to you that, as in many studies in the past and studies that this office has done, it is hard to quantify and identify and to know the extent of the real problem of revolving door.

There are many, many anecdotal and sensational stories about switching sides. We all know them; they have been in the paper. That is the perceived problem.

So I hope that answers your question, Mr. Chairman.

The CHAIRMAN. Well, in view of the situation that has been going on not only in this administration, but previous administrations, is there a problem with the actual or the appearance of access or influence peddling?

Mr. MARTIN. There is the apparent perception of influence peddling, and I guess in some cases there is an actual. But when I look at your legislation, as I indicated in my prepared remarks, I have difficulty supporting it in its present form because the sweep is so broad.

The CHAIRMAN. Well, I will be glad to have you make any suggestions about revisions or modifications.

Mr. MARTIN. I have some, Mr. Chairman, and I look forward to working with your staff and—

The CHAIRMAN. If you will work with the staff on any suggestions you have.

Mr. MARTIN. I have some and I hope to be able to assist you in that regard.

The CHAIRMAN. I understand that you have indicated that you are concerned that my bill, S. 2334, might stifle legitimate career aspirations of Federal employees. Do you believe influence peddling is a legitimate career aspiration? [Laughter.]

Mr. MARTIN. That is a hard one to oppose. Mr. Chairman, I think that there is a place—as I think some of the members have observed, there is a place for legitimate, informed lobbying.

Is an uninformed provider of access a legitimate career aspiration? I would have trouble saying that it is, standing by itself.

The CHAIRMAN. Mr. Martin, if there is a problem with ethics laws, we have two clear choices: do nothing or try to correct the problem. You indicate that S. 2334, my bill, is too encompassing.

Would you want to tell us how you would draft a bill, short of the language in S. 2334, which would address the problem of influence peddling without creating loopholes in the law? Would you want to submit to us a memorandum with your recommendations on it?

Mr. MARTIN. I would be glad to submit to you some document that demonstrates my concern, and with some proposals.

My problem with section 1 of your bill is that I think it cuts too broadly and includes too many people in its sweep. I think there is a substantial difference between a Cabinet Secretary and a file clerk.

I think that you have to make a cut, if you will, which is the way I term it in my office, as to whom these Governmentwide prohibitions should apply. I do not believe that it serves any legitimate civil or criminal purpose to prevent a GS-11 or even a GS-14 career person or noncareer person from having representational activities in an area that is away from his job or from his agency in another branch or even another agency within a branch.

So what I am saying to you is I think a qualitative decision has to be made as to who would suffer the prohibitions in your bill, and I would not treat all Federal employees the same in that regard.

The CHAIRMAN. Do you feel that people who are in Government should go in with a motivation and incentive to serve the public, to serve the people, or should they go in with the idea of using that as a ticket to gaining knowledge and information that they can then use for their own financial benefit?

Mr. MARTIN. Mr. Chairman, I give approximately 40 speeches a year to Government officials and others, and part of the standard, stock phrase I use is public service is a public trust, and I believe that and I believe when you serve the Government, that is who you serve, and no one else.

I do think there is a legitimate concern that we do not want to prevent a person from using his expertise and his knowledge when he leaves the Government. I also think that we do not want to prohibit or prevent the recruitment and retention of qualified people in the Government.

I believe that we need in this Government a lot of viewpoints to make it function in all branches. I think that we need people from the private sector, from think tanks and educational institutions, and from the academic world, as well as people from the political world.

I think that this is what makes our Government strong, is the mix of ideas that comes in, and I think that people coming in and leaving make it strong as well. So I do not view a pure revolving door—that is, people who come in and leave and do not misuse their office, but do use the expertise or the experience they have gained in a legitimate fashion—as a problem.

It is the things that I mentioned earlier in my testimony that I think create the problems, and one of them, at high levels when you switch sides, is a perception.

The CHAIRMAN. We would be pleased to have you submit whatever suggestions you have to remedy the situation, as you see it, to the staff for consideration.

Mr. MARTIN. Mr. Chairman, I will be glad to do that.

The CHAIRMAN. The distinguished Senator from Ohio.

Senator METZENBAUM. Mr. Martin, nice to see you again.

Mr. MARTIN. Nice to see you, Senator.

Senator METZENBAUM. In your testimony, you state that you are unaware of any general concerns that would demonstrate a public harm that has a substantive relationship to the breadth of the net this proposal would cast.

That is a very strong, negative statement. A front-page story in Sunday's Washington Post listed 110 senior administration officials who have been accused of unethical or illegal conduct since 1981.

Last week, the New York Times reported on 10 former top administration officials or White House aides who have become high-priced lobbyists, frequently representing foreign governments.

In light of these reports, and there are a host of others, are you not the least bit concerned that such a large-scale appearance of impropriety may constitute a public harm which should be addressed by new legislation?

Mr. MARTIN. Senator, let me answer your question this way. I was talking about the breadth of the coverage. This bill, S. 2334, would bring in everybody from a file clerk to a Cabinet secretary, from a Senator—

Senator METZENBAUM. Did you ever hear of a file clerk becoming a lobbyist?

Mr. MARTIN. Pardon me?

Senator METZENBAUM. Did you ever hear of a file clerk becoming a lobbyist? Are you not really giving us some sort of an illusory kind of a target? File clerks do not become lobbyists. Executives and people who have staff positions become lobbyists.

Mr. MARTIN. But you are talking about a no-contact, no-representation kind of—

Senator METZENBAUM. We are not saying no contact.

Mr. MARTIN. Between the file clerk and the Cabinet secretary, there are a lot of people at a lot of grades. There are 2 million employees in the executive branch.

Senator METZENBAUM. That is right, and what is so terrible about saying that they cannot represent some particular group in lobbying with the Government of the United States?

Mr. MARTIN. Well, if I am a GS-15 at the Federal Elections Commission and I go into private practice and somebody hires me to make a filing at the Securities and Exchange Commission, I do not see that I am using my expertise or my knowledge or anything that I gained while I was at the Federal Elections Commission to do a representation at the SEC.

Senator METZENBAUM. Would that be barred under this bill?

Mr. MARTIN. Yes, it would.

Senator METZENBAUM. Well, we probably can make an exemption so you can do work over there. [Laughter.]

Mr. MARTIN. Well, that is the kind of sweep I am talking about, Senator, that I think you cannot—my statement that you quoted speaks to that kind of situation. I just do not think it is justified. I think you have to make a cut and make a determination as to who it is you want these prohibitions to apply to, and how deep do you want them to go and to what branches.

Senator METZENBAUM. Well, Mr. Martin, your statement is very broad in your opposition:

We cannot support the all-encompassing type of restrictions which this proposal contains for former employees of the executive branch. We are unaware of any studies or general concerns that would demonstrate a public harm that has a substantive relationship to the breadth of the net this proposal would cast. We do not see where there is harm, actual or apparent, in allowing most former officers or employees of any branch of the government to represent someone before another branch of Government.

Mr. MARTIN. That is correct. I believe that.

Senator METZENBAUM [quoting]:

In our view, representations made by an employee who has left one branch of Government to a different branch will not be perceived as affecting any resulting Government action other than as a reasonable, fair and unbiased process.

Mr. MARTIN. Correct.

Senator METZENBAUM. Do you think that people in the Department of Defense who one week are negotiating contracts with Boeing or General Dynamics or General Electric, or whomever, should the next week be employed by those same people?

Mr. MARTIN. Well, it depends in what context you want them to be employed. What I addressed my remarks to, Senator, was this—

Senator METZENBAUM. I do not care what context. That is exactly the problem. That is exactly the kind of technical stuff we get today, and that is the reason so many Department of Defense employees are in this revolving door, about which you have no problem. You do not view the revolving door as a problem.

Mr. MARTIN. That is an inaccurate restatement.

Senator METZENBAUM. Well, you said it; I wrote it down as you said it.

Mr. MARTIN. I said there is a perceived problem, but there is not sufficient data to demonstrate a real problem.

Senator METZENBAUM. How long have you been the head of the Office of Government Ethics?

Mr. MARTIN. A little over 2½ years.

Senator METZENBAUM. And you have not been able to find that it is a real problem in the 2½ years you have been head?

Mr. MARTIN. Well, there have been a lot of studies by GAO, and I would like to read you a quote from a GAO study as recent as 1985. I quote:

The extent to which a post-Federal problem exists is not known. Appropriate levels of enforcement have not been determined and little hard data is available to determine whether or not existing statutes and regulations are adequate to preclude post-federal employment problems or the appearance of such problems.

Now, that is a pretty recent study, and what I am saying to you, Senator, is that hard data is not there to support the kind of sweeping proposal that we have in this legislation.

Senator METZENBAUM. You have held this position for 2½ years. Have you not been able to come up with enough information to satisfy your concerns?

Mr. MARTIN. Senator, I have a staff of 23 people. We inspect each Federal executive agency once every 3 years, and part of our inspection is a questioning of post-Federal employment problems.

I do get, in instances, statements from certain installations that there is a morale problem, as I mentioned in my previous testimony about the implications that are involved in the revolving door problem.

But I have not had the manpower or money to undertake the kind of study that I think is necessary to determine whether or not this kind of legislation is needed.

Senator METZENBAUM. So you disagree with the Justice Department on the need for this bill?

Mr. MARTIN. No.

Senator METZENBAUM. You agree that there is a need for this bill?

Mr. MARTIN. I agree there is a need to examine this issue, and I have agreed to work with the chairman on formulating what I think would be a reasonable alternative to some of his provisions.

Senator METZENBAUM. Give me some idea of what you think would be reasonable as distinguished from the chairman's position?

Mr. MARTIN. Well, can I speak as David Martin, an individual, and not as an administration spokesman on that, Senator?

Senator METZENBAUM. As far as I am concerned, you can speak any way you want, Mr. Martin.

Mr. MARTIN. Well, that is what I have to do because none of this has been cleared with the administration.

Well, I might propose as an alternative that all former Government employees of all branches have a lifetime ban on assisting or representing another with respect to particular matters involving specific parties in which the employee had been personally and substantially involved; that is, I would extend the 207(a) prohibition to all branches of the Government, plus, in conjunction with what the Department of Justice said, I might consider the quarter-backing aspect—that is what Mr. Keeney indicated—that is not now presently prohibited, and that is the person who sits back in corporate headquarters or trade association headquarters and kind of advises how things work in the Government.

Mr. Keeney said he wanted to look at that. I think we could look at that as well.

Senator METZENBAUM. I am not sure that I get the distinction you are making. You said it rather rapidly; slow down.

Mr. MARTIN. I am sorry. I tend to speak too quickly.

I would extend the present prohibitions in 207(a) to all branches of the Federal Government.

Senator METZENBAUM. OK, and that is all?

Mr. MARTIN. Then I would consider, as Mr. Keeney said he would consider, whether or not, on particular matters involving specific parties, that prohibition should also extend to the assisting part.

Presently, you may not go back to the government and do representational work.

Senator METZENBAUM. You would extend—

Mr. MARTIN. I think it should be considered whether or not you also want to extend that to the assisting part; that is, the quarter-backing aspect of it.

Senator METZENBAUM. That is all you would do?

Mr. MARTIN. Well, that is No. 1.

Senator METZENBAUM. OK. No. 2?

Mr. MARTIN. No. 2, I think that you could consider a 2-year ban, on the same kind of theory, to matters that were pending under somebody's official responsibility.

Senator METZENBAUM. That is the kind of provision that is in the Department of Defense now, is it not?

Mr. MARTIN. No. That is similar to a present 207(b)(ii), which—

Senator METZENBAUM. So that you have to have the particular matter under consideration, but if you leave and you go across the street and you work for the company or for the Government, you can come back as long as you are not involved in that specific matter?

Mr. MARTIN. You can. Well, the one I am thinking about—let me start all over again.

If you leave the Government and a matter was under your official responsibility, you could not come back and do representational work on that for a period of 2 years. That is present law.

Senator METZENBAUM. OK.

Mr. MARTIN. OK.

Senator METZENBAUM. What would you do?

Mr. MARTIN. What I am saying is you might want to consider extending that also to the assisting part.

Senator METZENBAUM. That is all you would do?

Mr. MARTIN. Well, that is No. 2.

Senator METZENBAUM. No. 3?

Mr. MARTIN. There is now presently, as you know, a 207(c), a 1-year cooling-off period; that is, you may not return to your former agency for 1 year with an attempt to influence.

I think we should consider whether or not, at high levels, that ban should be extended to an entire branch. For instance, if you, Senator, were to leave the Senate, whether or not we should prohibit you, for 1 year, from coming back here and not just trying to lobby your own office or the Senate, but anybody in Congress or any member of Congress, or whether or not that prohibition should extend—

Senator METZENBAUM. If I leave, it would be pretty hard to lobby my office, I guess.

Mr. MARTIN [continuing]. Or whether or not that prohibition should extend to other branches of the government; in other words, a variation of present section 207(c).

Senator METZENBAUM. Anything further?

Mr. MARTIN. And then I am sympathetic to—and I have not done a lot of analysis on this, but I am sympathetic to the foreign entity concern in the chairman's bill. I am not aware of the problems in great detail involving the use of secret information and sensitive information by people in a position to then trade on that by representing a foreign government.

But I am sympathetic to that concept, as Mr. Keeney was, and think that that should be explored.

Senator METZENBAUM. Let me ask you, how does the Office of Government Ethics proceed when it hears or reads about a possible instance of unethical conduct? Do you ever initiate your own inquiry or investigation into the facts, or do you wait for a formal or written complaint from outside before taking any action? Do you ignore what you read in the papers?

Mr. MARTIN. Senator, a great deal of the information we get comes from the newspapers, as a matter of fact. We are authorized to instigate our own investigations. I do not have an investigative staff.

I have to rely on the inspectors general or the FBI. I have that authority and it is in the act, and frequently I have directed that certain investigations be undertaken.

Senator METZENBAUM. You have been the head of OGE for 2½ years. Would you tell me how many times you initiated your own inquiry or investigation into the facts?

Mr. MARTIN. Oh, probably half a dozen times, or more.

Senator METZENBAUM. Just half a dozen?

Mr. MARTIN. Well, that is an investigation. Now, hundreds of times I have called or written to a designated agency ethics official. For ethics matters, the general counsel usually is the ethics official.

If an allegation comes up in an agency, I will either call or write or have someone in my staff ask that ethics official to determine the facts for me and get back to me. Now, if you want to call that a request for an investigation, that is the same kind of thing.

But I limited myself in my earlier response to where I specifically asked an inspector general or the FBI or someone to investigate.

Senator METZENBAUM. And when you find something is unethical or you think it might be, what action do you take?

Mr. MARTIN. Well, as you know, the head of the agency in terms of standards of conduct—if it is a criminal matter, I refer it to the Department of Justice.

Senator METZENBAUM. Have you done that at all in the 2½ years you have been in office?

Mr. MARTIN. Many.

Senator METZENBAUM. Many, you have referred——

Mr. MARTIN. Sure.

Senator METZENBAUM [continuing]. To the Department of Justice for prosecution?

Mr. MARTIN. Yes, I have.

Senator METZENBAUM. And how many have proceeded forward from that point?

Mr. MARTIN. I would have to find that out for you. I do not know, but a number.

Senator METZENBAUM. A number?

Mr. MARTIN. Yes.

Senator METZENBAUM. All right. Let us have the actual facts, please.

Mr. MARTIN. OK. When it is not a criminal matter, then it is a standards of conduct problem and, as you know, the head of the agency is responsible for disciplining the employees in his agency.

I tend to follow up on what the head of the agency does in a particular matter

Senator METZENBAUM. I have no further questions.

The CHAIRMAN. Mr. Martin, it is disturbing when you read what you read in the Washington Post, and I would just quote briefly a few excerpts.

Negotiator Charles R. Carlisle said he discovered that the United States negotiating position had been compromised when he made stops in Hong Kong, South Korea and Taiwan to describe the U.S. position in negotiations to renew the multifiber arrangement which regulates textile trade. The three nations are leading Far East suppliers of textiles and clothing to the United States market.

Carlisle said that the U.S. position was already known. He says, further, "Certain sensitive information became known to some foreign governments before I conveyed it." Carlisle said in an interview, "It is a problem in this city, a very regrettable problem that undercuts our ability to conduct the nation's business."

Now, I am wondering how can we have confidence in our negotiators who are bargaining for us if they immediately go out and represent foreign nations.

Mr. MARTIN. Well, it is disturbing, Senator, and this is the first I have heard of this and I have no facts except what I have heard you read here now. I think it is terrible that if we had a negotiating position and it was compromised—I just deplore it.

The CHAIRMAN. Do you not think something ought to be done about this?

Mr. MARTIN. I think it needs to be examined.

The CHAIRMAN. Examined? Well, if the facts are as stated here, do you not think some action needs to be taken?

Mr. MARTIN. If, in fact, the facts are accurate, I would think that your bill will deal with those kinds of things.

The CHAIRMAN. Mr. Carlisle is an ambassador of this Nation, and that is what he said publicly today in today's paper.

Any further questions?

Senator SPECTER. Yes. Thank you, Mr. Chairman.

Mr. Martin, I think your testimony has been very helpful, and I think that a number of your positions may come close to what the chairman, Senator Thurmond, is seeking to accomplish. I would agree with you that clerks ought not to be covered.

That language is too pervasive. Maybe some clerk will be a lobbyist and they ought not to be foreclosed from that. But it seems to me that the considerations you have made here to a substantial extent are from the point of view of the ethics perspective as opposed to criminal prosecution, which is what Senator Thurmond is focusing on, and it is illustrated in his last question.

What Senator Thurmond is seeking to do here, in making absolute prohibition that no Federal employee or perhaps no high-ranking Federal employee shall lobby any Federal official for a year, really puts somebody who has trade negotiations on notice that they cannot go to work for a foreign government for 2 years. Then it removes that temptation because they have got a 2-year period where they are just out of it.

When you look at an ethical issue, you want to have some relationship between what the individual did and the knowledge they had in a position. It is very different from criminal prosecution.

As a former prosecutor, I can see the trouble that they had in framing prosecutions which deal with concepts like "substantially"—just too vague to really deal with. What Senator Thurmond is looking toward here, and what I think is valid, is a clear-cut rule which will stand up in court, and in a criminal court, to put some real teeth into having people act properly in Government.

Also in your statement, you go beyond actual harm to the Government. You say on page 4 "preventing a perceived or actual harm to the government," so that you agree, do you not, that if there is a public perception of impropriety or harm to the Government, harm to the taxpayers, even though it is only a perception, that that should be covered by the statute?

Mr. MARTIN. Well, I believe that if there is a perceived harm to the government that affects the Government and it affects the confidence of the people in the ability of the Government to do its job.

But I have trouble—I seriously have trouble in recommending that you pass a criminal law based on a perception, and I just would hate to see a pretty wide net thrown out there and have a class of career Government employees become criminals.

Senator SPECTER. How about an ethical rule based on a perception?

Mr. MARTIN. Well, you know, I prefer civil remedies in the ethics area. I think they are easier to enforce. The burden of proof is easier, and in some situations you might want to put the prohibition to go to the employer and not only the former Federal employee who gets employed. Therefore, you have kind of a double bite and—

Senator SPECTER. You are making an argument that the law perhaps ought to be broadened to put a prohibition on someone who employs a former government employee, but there you are really dealing with a bribery situation where there is a quid pro quo that

can be shown. The employer would have to know that something was amiss.

On this issue of perception, I think there is a very important distinction. It seems to me that your written statement is at variance, unless I misunderstand your oral testimony, because your written statement says that there ought to be action to prevent "a perceived or actual harm to the government."

I believe that that is a very important aspect; if there is a widespread public perception that there is impropriety and wrongdoing, that is something we ought to deal with.

The people in Pennsylvania, and I think the people in this country, are feeling very badly about what they are reading about Washington today and really wondering what is going on around here. So, I think that perception is critical, and that is what you say in your written statement.

Mr. MARTIN. I believe there is a perception problem. As I said in my opening remarks, there are two measuring rods. Is there a problem? Yes. If you use the perception measuring rod, there is a problem.

Senator SPECTER. Are you prepared to use the perception measuring rod or not?

Mr. MARTIN. Well, I have to use it frequently in the civil arena in the standards of conduct.

Senator SPECTER. I take it that is a yes answer?

Mr. MARTIN. That is a yes answer.

Senator SPECTER. OK. You also in your written statement, make a very significant distinction when you talk about two forms of adverse conduct, and it is worth just a minute to read them because the following sentence does not really tie in.

You say at page 4:

Post-employment restrictions were traditionally enacted to prevent the use of inside information or influence as to specific matters in which the former employee participated or matters which he or she supervised, or prevent the use of personal influence on the part of former senior officials for a period of time so that their former colleagues and subordinates have an opportunity to readjust their professional relationships with the individual.

I think that makes good sense, but then you go on to say:

In both kinds of restrictions, there is a direct relationship between duties the former official performed or information he or she had and the restriction.

But that is not so because you have already covered the intention of the use of influence on the part of senior officials, and I think that is a critical distinction. The existing law deals with access to specific information, personal and substantial activities, whereas what Senator Thurmond is looking toward, and what I would certainly be looking for, is to stop high-ranking officials from lobbying, whether or not it involved their specific duties, because they have tremendous sway with their former colleagues.

And you come down on that when you say "to prevent the use of personal influence on the part of former senior officials for a period of time so that their former colleagues and subordinates have an opportunity to readjust," et cetera.

Mr. MARTIN. That is now the law in 207(c) in regard to returning to your former agency.

Senator SPECTER. The problem with that is it is too restricted. You said in response to one of Senator Metzenbaum's questions that you would be willing to expand it beyond the legislative branch, perhaps, to the executive. I would urge you to explore that further.

I think your experience could be very helpful to this committee in modifying and improving what we are dealing with here. I think you put your finger on a really critical factor about high-ranking officials.

Within your own text, you deviate a little from what you had said before, so that when you deal with a high-ranking official there is a lot of power to have actual influence. Beyond any question there is the perception of influence when a high-ranking governmental official goes back and deals with people that he was with a short time before, or has had relationships with over a 20-year period. He may be out of Government for a year and then he is back.

The record shows that the witness is nodding in the affirmative.

Mr. MARTIN. Well, I am agreeing with your general statements.

Senator SPECTER. OK. I think that pretty well covers it, Mr. Chairman. The hour is late and we have kept Mr. Martin here a long while.

The CHAIRMAN. Thank you, Senator.

Senator SPECTER. I again say that I think your testimony is very helpful, and I believe that the kind of dangers that Senator Thurmond is looking to are really comprehended within what you are moving toward.

I would urge you in taking a look at it—are you an attorney, Mr. Martin?

Mr. MARTIN. Yes; I am.

Senator SPECTER. Have you had any practice in the criminal courts?

Mr. MARTIN. I started at the Department of Justice as a prosecutor.

Senator SPECTER. OK, fine. Then I would ask you to put two hats on your two heads and to think about some of the aspects as to what is realistic in a criminal prosecution—fairness to the accused where there is a precise and ascertainable standard and it is not subjected to the vagaries so that we can bring these cases where the facts warrant it in a clear-cut situation.

Mr. MARTIN. I will certainly do that, Senator.

Senator SPECTER. Thank you very much, Mr. Martin. Thank you, Mr. Chairman.

The CHAIRMAN. Well, Mr. Martin, you are going to get to the staff, then, your recommendations, as I understand it.

Mr. MARTIN. Yes; I will.

The CHAIRMAN. Can you do that as soon as possible?

Mr. MARTIN. I would do that, Mr. Chairman.

[The prepared statement follows.]

STATEMENT OF

DAVID H. MARTIN
DIRECTOR
OFFICE OF GOVERNMENT ETHICS

participated personally and substantially while a government employee. This is a lifetime bar. There are two important limitations to this prohibition which attack "switching sides." First, the former employee is not restricted unless the matter in which he or she previously participated was (1) a "particular matter involving specific parties" and (2) is the same matter in which he or she now attempts to represent another before the Government. For instance, where an employee's prior involvement was limited to the design of a program policy, general rule-making or technical concepts -- matters which do not involve specific parties -- he or she is not restricted by this prohibition as to any specific matter which may involve his or her prior work. Second, this bar requires that the employee be personally involved in the matter in a substantial way. The kind of representation that is restricted includes not only acting as another's attorney or agent, but any other kind of representation or communication made with the intent to influence the United States. This includes promotional and contract representations. It also includes representations made with or without compensation.

The current provisions of 18 U.S.C. § 207(b) and (c) dealing with prohibitions involving representations on matters under a former employee's "official responsibility" and representations made by a "senior employee" would be replaced by S. 2334 as follows:

- (1) A one year restriction, after termination of employment, on all federal employees (executive, legislative and judicial) and Members of Congress, on making any oral or written communication to Congress or any other branch of the federal Government with the intent to influence on behalf of another person for compensation or other remuneration;
- (2) A two year restriction, after termination of employment, on all federal employees (executive, legislative and judicial) and Members of Congress, who (A) are employed by, advise, represent or assist a foreign entity for compensation or remuneration or (B) with intent to influence make an oral or written communication to Congress or any other branch of government on behalf of a foreign entity for compensation; and
- (3) A lifetime restriction on those individuals in the executive branch having been

employed in or currently serving in Executive Level I or II positions or certain additional positions in the White House Office for which the rate of pay does equal or exceed the rate currently being paid for Executive Level II. This restriction would bar them with or without compensation from being employed by, representing, or assisting in any way a foreign entity or with the intent to influence, make oral or written communications to Congress or any other branch of the federal Government on behalf of the foreign entity.

While we can not support S. 2334, I commend this Committee for recognizing the need to create a more uniform approach to post-federal employment issues. Too often in the past there has been criticism suggesting that a double standard has been employed in matters involving ethics, standards of conduct, and criminal conflicts of interest matters. Some suggest that congressional rules governing Members of Congress and their staffs are more lax than those applied in the executive branch; others contend that career employees in the executive branch are treated differently than political employees. Recognizing that post employment concerns should not be restricted to officers and employees of the executive branch is viewed very positively by this Office.

However, while we believe that certain of the same concerns regarding the misuse of personal influence are present regardless of which branch of government an individual serves, we cannot support the all encompassing types of restrictions which this proposal contains for former employees of the executive branch. Many of the following concerns regarding the sweep and coverage of S. 2334 might be held by officers and employees of the judicial and legislative branches as well.

In enacting post employment or any conflict of interest restrictions, we believe that the restriction should have some reasonable relationship to preventing a perceived or actual harm to the Government and that the Government's need to avoid the harm outweighs all other interests involved. We are unaware of any studies or general concerns that would demonstrate a public harm that has a substantive relationship to the breadth of the net this proposal would cast. Post employment restrictions were traditionally enacted to prevent the use of inside information or influence as to specific matters in which the former employee participated or matters which he or she supervised, or prevent the use of personal influence on the part of former senior officials for a period of time so that their former colleagues and subordinates have an opportunity to readjust their professional relationship with the individual. In both kinds of restrictions, there is a direct relationship between duties the former official performed, or information he or she had, and the

restriction. Thus, we do not see where there is harm, actual or apparent, in allowing most former officers or employees of any branch of the government to represent someone before another branch of government. A primary purpose of the conflict of interest laws is to protect the integrity of the decision-making process in government. In our view, representations made by an employee who has left one branch of government, to a different branch, will not be perceived as affecting any resulting government action other than as a reasonable, fair and unbiased process. This is true even to restrictions that are limited to an officer or employee's branch of government. It makes no difference to our analysis whether the person represents a foreign entity or not, or for that matter whether the individual is paid. What is paramount is prohibiting the use of inside information and personal influence.

We recognize that restrictions which apply to everyone on all matters are very attractive, especially to those of us who must determine designations and administer restrictions. We also recognize the validity of the types of concerns which are expressed towards the present post employment restrictions. It should be possible, however, to address these concerns without stifling the legitimate career aspirations of the majority of government workers or the ability of our society to achieve healthy benefits from the mobility of workers between the private and public sectors.

We note the following technical issues with respect to the present language of S. 2334. The bill specifically includes the officers and employees of "a government corporation, government controlled corporation, or an independent establishment as defined in section 104 of title 5" Yet in paragraph (1) of subsection (b), the listed entities with respect to which representations are prohibited do not include these same entities. It would be reasonable to apply post employment restrictions to any Member of Congress or any officer or employee of the executive, judicial or legislative branch of the Government, of any independent agency of the United States or any officer or employee of a government corporation who is by the corporation's statutory authority an officer or employee of the federal government. Many individuals who are employees of "mixed ownership corporations" or other corporations established by statute are not by law officers or employees of the federal government and it is questionable whether these individuals should be covered by this one provision of the criminal conflict of interest statutes.

We note also that the terms "compensation, financial gain, or other remuneration" are used, but there is no definition indicating whether these terms have separate meanings.

S. 2334 is impractical because it would seem that nonresident aliens are covered. First, nonresident aliens who are hired as employees of the United States government in their own countries to assist, for example, in servicing the functions of the State Department, Defense Department, AID, and USIA would be severely affected. On the face of this proposal, these individuals would be prohibited from being employed by almost anyone in their own countries upon leaving the U.S. employ. This feature would substantially impair our government's foreign operations and may very well be unenforceable.

We also observe that because of the manner in which the term "foreign entity" is defined by proposed subsection (h), the apparent intent of proposed subsections (b)(2) and (c) might be easily avoided. The literal prohibitions of these provisions would not be violated if a former government employee were to provide services to a United States corporation or other domestic entity which was controlled by a party described in proposed subsection (h).

Like any rule, restrictions must have exceptions which apply to special circumstances. However, we are not sure that those embodied in the current proposal cover all the necessary special considerations which may result from the increased restrictions. For instance, present section (d)(1) limits application of the restrictions for former employees who act in their capacity as an elected official of a federal, state, or local government. Further, the bill would bar public service with international organizations such as the United Nations or the International Red Cross.

S. 2334 would apply to the testimony under oath by those individuals who may be subject to the lifetime proscriptions under section 207(a). What is a former employee to do when subpoenaed to testify on a matter in which he or she participated while in federal service?

Finally, close consideration should be given the effective date of any post employment amendments from the standpoint of due process. Since the restriction will be viewed by some as an encroachment on individual freedom of choice, a delay in the effective date may give some currently employed individuals the option of terminating federal employment in lieu of subjecting themselves to further restriction. Also, we would urge that due process require that no provision, such as the proposed subsection (c), should have a lifetime ban not related to a specific matter nor in fairness apply to any individual who has already terminated government service.

The CHAIRMAN. Now, we are going to have a second hearing to further consider this matter and we will announce the time and place later.

We now stand adjourned.

[Whereupon, at 4:42 p.m., the committee was adjourned.]

INTEGRITY IN POST EMPLOYMENT ACT OF 1986—S. 2334

WEDNESDAY, JUNE 18, 1986

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10:15 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) and Hon. Charles McC. Mathias, presiding.

Also present: Senators Biden, McConnell, Denton, Leahy, DeConcini, Specter, and Grassley.

Staff present: Terry Wooten, counsel; Steve Metalitz, counsel; and Cindy Lebow, minority counsel.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. The committee will come to order.

We have received word that the chairman, Senator Thurmond, is delayed in another committee meeting of the Committee on Armed Services, and he has asked us to go forward. He hopes that he will be able to get here shortly.

I have not prepared any particular opening remarks. My views on this legislation have already been spread very fully and at-large upon the record of this committee, and I won't take the time of the witnesses to repeat them this morning.

But before I call the first witness, I wish to place in the record opening statements by several members of this committee.

[Statements follow:]

PREPARED STATEMENT OF CHAIRMAN STROM THURMOND

Today we are holding this second hearing on the S. 2334 substitute, legislation that will restrict Members of Congress and federal employees and officers of all three branches from lobbying the Federal Government on behalf of both domestic and foreign entities. The original proposal—and the substitute amendment—mandate a prohibition on higher level officials and employees, including Members of Congress, prohibiting them from being employed by, representing, assisting, or advising a foreign government or entity.

There is something very disquieting to me, and I suspect the great majority of Americans, about Government officials leaving public service and going to work for, assisting, advising, lobbying or in any way representing a *foreign* interest. The ten-year prohibition mandated by this legislation against this practice would help end the problem of foreign entities gaining knowledge and information, in any way, about such things as our Nation's international trade strategy or defense posture from former officials whose knowledge of those issues could do harm to this Country if it is conveyed to others.

An initial hearing was held on this legislation on April 29th. After this hearing, we requested that anyone interested in modifications to the bill should respond with their suggestions. Senator Metzenbaum, Senator Simon, Senator Biden submitted amendments. I met with Senator Metzenbaum and Senator Simon to discuss their proposed amendments. We reached a consensus which led to a substitute amendment for my original bill.

Senator Mathias requested that an additional hearing be held on this substitute. The purpose of this hearing today is to consider the substitute and other relevant matters concerning this legislation. Tomorrow, the Full Committee will consider and vote on this legislation.

In conclusion, I believe S. 2334 was a starting place for Congress to consider much-needed changes to the confusing and oftentimes conflicting laws governing former Members and Federal officials who lobby the Government or work for a foreign entity. The consensus substitute fine tunes and improves the original proposal.

When we face a serious problem such as the misuse of influence and access, we have two alternatives—do nothing, or take steps to resolve the problem. I believe we must take action to prevent irreparable damage to our Nation and to restore public confidence and integrity in our system of Government. It is time that Public service be just that—not a stepping stone for future employment or profit. This legislation will help to ensure that future federal officials and employees serve their country—not themselves or foreign interests.

We have an impressive panel of witnesses assembled for this hearing. I expect an informative hearing as we continue examination of this critical area.

PREPARED STATEMENT OF HON. JEREMIAH DENTON

Mr. Chairman, I want to commend you for holding this follow-up hearing on S. 2334. I believe that the hearing is necessary in light of the many concerns which have been expressed about the constitutionality and advisability of the bill. The substitute amendment which has been circulated addresses some of those concerns, but many problem areas remain.

I fear that both S. 2334 and the proposed substitute, as drafted, could have results which are wholly unintended by the proponents of the legislation. I share the concerns which have been expressed by Senator Mathias, the Justice Department, the American Civil Liberties Union and others that the legislation might unduly restrict the First Amendment rights of former government employees and deter outstanding individual from offering themselves for public service. We must also consider the adverse effect which the bill might have on the healthy and legitimate flow of information to and from the Federal Government.

In addition, we should determine the extent to which the problems sought to be addressed by S. 2334 are already covered by existing law. I am hopeful that the hearing will address this issue.

As well-intentioned as this legislation is, I believe that it needs more thought and study. This hearing will be extremely helpful to that process, and I look forward to receiving the testimony.

PREPARED STATEMENT OF SENATOR MITCH MCCONNELL

Mr. Chairman, I commend you for calling a further hearing on S. 2334, the Integrity in Post Employment Act of 1986, as well for your leadership on this vital issue. I fully agree that we must not have even the merest perception that our government is for sale to the highest bidder.

I have been troubled by the scope of the original S. 2334, however, as well as that of the recently introduced substitute amendment. I have been particularly troubled by the range of those who have commented against S. 2334, from the Departments of Justice, State, and Defense to the American Civil Liberties Union. Mr. Chairman, when interests as normally antagonistic as these agree, frankly, I have to take note.

Together with some other members of this committee, I will look forward to reviewing the testimony of the distinguished group of witnesses gathered here today with these concerns in mind.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR DENNIS DeCONCINI

Mr. Chairman, you and your staff, as well as other Members and their staffs, should be commended for your efforts on this important piece of legislation. There is something very disturbing to me, and I suspect to most Americans, about Government officials and employees leaving their jobs and then marketing their access and influence for private gain. There is also the problem of Federal officials who possess sensitive information about national security and trade, peddling that information to a foreign entity.

I believe Americans feel reform in this area is long overdue. We cannot tolerate the practice of using federal employment to gain privileged information to be later used for profit in the private sector as a lobbyist. Neither can we tolerate the practice of selling access and influence, to the possible detriment of our country. Currently, there are many overlapping, conflicting, and ambiguous post-employment restrictions that have proven ineffective. S. 2334 would replace this confused system with direct, straightforward, across the board limitations on post-government employment activities.

The honorable goal of an open and clean government is not one which is of a partisan nature. We should all work together to help insure the integrity and the public confidence in our government and former federal employees. For these reasons, I support the adoption of this needed legislation.

PREPARED STATEMENT OF SENATOR PATRICK LEAHY

Mr. Chairman, I want to thank you and Senator Mathias for taking the time to hold this hearing.

I am a cosponsor of this bill. I think every member of our Committee supports it in principal. We all want to put an end to influence peddling by former high-level government officials. This bill should leave no lingering doubts in the minds of future government employees about what is acceptable behavior once they leave office.

As Senator Mathias has pointed out, this bill sweeps very broadly. We want to stop the abuses, but we don't want to discourage qualified individuals from seeking government jobs. For example, it has been pointed out that the bill could prevent a former Attorney General from ever advising a foreign government on its judicial system. It could bar a former EPA employee from advising a foreign company doing business in the United States on the requirements of federal environmental regulations. I don't think we should discourage this kind of activity, but I do think we need to act quickly to stop the growing cynicism on the part of the American people that the government is for sale. Lobbying by former high-level officials, exemplified by the Michael Deaver case, destroys the confidence and respect in government that is so essential to a healthy democracy.

I am pleased that the Committee is working to narrow the scope of this bill without weakening its main provisions. I hope we can complete this job quickly, because the longer we wait the more Congress becomes identified as part of the problem. This Committee should be on record as having acted quickly to reaffirm our commitment to preserving a high standard of integrity in government.

Senator MATHIAS. We will call as our first witness the Assistant Attorney General for the Criminal Division, Mr. Trott.

STATEMENT OF STEPHEN S. TROTT, ASSISTANT ATTORNEY GENERAL FOR THE CRIMINAL DIVISION, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY G. ALLEN CARVER, JR., PUBLIC INTEGRITY SECTION

Mr. TROTT. Mr. Chairman, I have with me Mr. Allen Carver, who is one of our senior lawyers in the Public Integrity Section of the Criminal Division, who is very familiar with these laws and is also available to assist me and you in examining these issues.

Senator MATHIAS. We are very pleased to have him here.

Mr. TROTT. Mr. Chairman, as we indicated to you in our recent letter, the Department of Justice has serious reservations about

certain aspects of this legislation. As I will explain in some detail, we have two primary concerns:

The bill would repeal a number of valid and important conflict of interest provisions in current law, and would put in their place sweeping prohibitions that are in some respects far too broad and in others far too narrow to serve what we understand are the legislation's several purposes.

We understand that major amendments are expected to be offered to S. 2334 during committee markup, though we do not know exactly what form they may take. What we do know about the modifications currently being considered suggests that they would not substantially alleviate the problems we see in the bill.

S. 2334 would repeal a number of provisions in current law that are aimed at controlling and preventing postemployment conflicts of interest. We believe that these provisions have proven efficient for enforcement and deterrence. The provisions to be repealed include the prohibition in 18 U.S.C. 207(b), effective for a 2-year period, against a former employee's acting in someone else's behalf, with or without compensation, in any matter that was under his or her official responsibility while in the Government.

Also to be repealed is the 2-year ban on former high-Government officials giving certain types of assistance in matters in which they were personally and substantially involved while in government.

S. 2334 would also repeal the "no-contact" rule of 18 U.S.C. 207(c), under which certain high-Government officials are barred for 1 year from communicating with their former agency in someone else's behalf on any matter. This 1-year bar was enacted in 1978 to deal with the disproportionate influence former Government officers might have upon the decisionmaking process in their former agencies when they leave the Federal Government.

Like 207(b), section 207(c) does not require that the offending representation be compensated, since the harm sought to be avoided is the unrestrained exercise of influence, without regard to whether it can be shown to have resulted in personal financial gain in a particular case.

As I stated, we believe both sections 207(b) and 207(c) have proven efficient and effective tools in controlling postemployment conflict of interest, and we strongly recommend that they not be repealed. If S. 2334 were enacted in its present form, the 2-year bar in 207(b) would be reduced to 1 year in cases of domestic representation, and eliminated entirely where such representation was uncompensated. The 1-year no-contact rule applicable to high-agency officials would no longer apply where the representation was uncompensated, thus leaving largely unaddressed the very problem for which 207(c) was enacted in 1978.

No reason has been given for repealing these laws and, in candor, we can think of no justification for doing so. We strongly recommend that the committee reconsider the wisdom of creating what will be major gaps in a system of laws that has been enacted with considerable care over the years.

The prohibitions that would be enacted by S. 2334 in its current form would mark a qualitative change from the approach previously taken by Congress in enacting conflict of interest laws. Existing conflict of interest laws have been carefully tailored to address cer-

tain problems and particular situations in which the potential for a conflict or the exercise of influence is likely to be present.

This is not true with all the provisions of S. 2334. Many of its prohibitions reach out to situations that could not imaginably involve a conflict of interest or raise an ethical concern. This is true of the proposed ban against any former Government employee having any communication with any Government agency on behalf of any other person for a period of 1 year.

It is equally true with respect to the 2-year ban, also applicable to all former Government employees, against being employed in any capacity by any "foreign entity." These absolute prohibitions go far beyond what might be regarded as reasonable prophylactic measures to prevent former Government employees from sharing privileged information with foreign governments or exercising improper influence because of their former government connections.

Ironically, a violation of either of the above prohibitions would depend upon a former employee's receipt of compensation. As I noted in connection with the laws that S. 2334 would repeal, most existing conflicts laws do not make receipt of compensation an element of the offense, for the sensible reason that this is simply not the evil sought to be checked.

The problem lies in the very use of privileged information or position, not in the receipt of compensation in any particular situation. Thus, the proposed prohibitions in S. 2334 would in this sense actually represent a narrowing of the range of conduct prohibited by the postemployment conflicts laws.

We are aware that certain amendments are being considered that would narrow the class of employees to which these broad postemployment restrictions would apply. However, we do not believe that these amendments will necessarily cure the fundamental problems to which we have briefly alluded. The effectiveness of the blanket prohibition approach is not improved simply by limiting its applicability to employees above a GS-11 grade level, without regard to whether these individuals' situations may in fact present any possibility of a conflict of interest.

While the amendments do introduce some additional latitude for attorneys performing representational work before courts and administrative agencies, such a blanket exception is subject to the same general objection as the blanket prohibition, not to mention an objection based on unexplained preferential treatment for attorneys.

The Department of Justice believes that the approach embodied in the postemployment restrictions in current law, which links postemployment restrictions to an employee's actual experience or position, better serves the Government's purpose of avoiding conflicts and the improper exercise of influence.

This principle of linkage, which we think is very important, ought to provide the basis for any prohibitions in this area. Any broader approach may be said to suffer cutting the neck to fix a serious nosebleed problem. Our objections extend to the proposed lifetime ban on high officials representing foreign entities under any circumstance which appears in our judgment to be far broader and harsher than is warranted by the expressed concerns of the sponsors of this legislation.

As this department has indicated in the past, it would also raise serious constitutional questions if it could be shown to deny a person his or her livelihood. We are not persuaded that reducing this blanket ban to 10 years and introducing specific exceptions, as have been proposed in the amendments, is sufficient to resolve these legal and policy doubts.

I would like to end my prepared testimony on a more positive note. The Department of Justice is gratified to see that most of the provisions contained in S. 2334 would be extended evenhandedly to employees of the legislative and judicial branches of Government as well as to those in the executive branch.

As everyone knows, in the past most of these criminal conflict of interest laws had a rather lopsided applicability only to employees of the executive branch. This has resulted in a certain unfairness insofar as employees in the other two branches are permitted to engage with impunity in conduct apparently having the same potential for generating conflicts and ethical breaches as that forbidden to those of us in the executive branch. At least in the area of postemployment restrictions there seems to be little justification for the difference in treatment, and we commend the committee for taking this important step.

Mr. Chairman, with that we would be pleased to answer any questions that you might have.

Senator MATHIAS. Thank you very much, Mr. Trott. Your views are extremely important because you and your successors in office will, of course, be where the first decisions are made in implementing either the existing law or any changes of that law.

Let me pose to you a hypothetical question and get your reaction as to whether or not the conduct that I imagine would be prohibited by this statute. And I suppose "by this statute" we have to refer to the Thurmond-Metzenbaum bill and the Thurmond-Metzenbaum amendment which you have just referred to, so that we get covered by both versions of the proposal.

Suppose that about eight years after he left the Cabinet, an Attorney General were requested by a foreign nation to come to that country and provide advice on the preparation of a new constitution or advice on the reconstitution of the police force in that country, some matter of high national policy. Would he commit a crime if he accepted that invitation?

Mr. TROTT. Mr. Carver, what would be your views on that? I think this could possibly create some problems under these proposals.

STATEMENT OF G. ALLEN CARVER, JR.

Mr. CARVER. Under both, sir. It would create problems for him under both.

Senator MATHIAS. It would create problems in either case?

Mr. CARVER. Conceivably so, yes, even with the exception provisions that would apply in the second instance. If I may elaborate, if you would like me to do so——

Senator MATHIAS. Yes, if you would.

Mr. CARVER. With respect to the original bill, the prohibition period is for life. With respect to the amendment, the prohibition

period is for 10 years, following actual employment. You mentioned 8, so he would fall within the period.

With respect to the *actus reus* of the crime, being employed by, advising, representing, advising a foreign entity and so forth is the *actus reus* in both versions. With respect to the attendant circumstances, no proof of compensation is required in either instance, and it would appear then that undertaking that sort of employment would be a crime unless one of the new exceptions in the amendment would somehow apply, and I am not so sure that the exceptions would.

Mr. TROTT. And I think your hypothetical, Senator, again underscores why we think there must be some linkage as the basis for any postemployment conflicts law. There is no linkage in the hypothetical.

Senator MATHIAS. That is right, and I would point out that there is no requirement that the ex-Attorney General lobby the U.S. Government or any branch of the U.S. Government, his activities would be purely in some far flung capital advising that country as to what it may want to do with respect to its constitutional procedures.

Mr. TROTT. I might indicate that more and more that is becoming a reality. Frequently we now supply to foreign countries people to talk about various legal matters, asset forfeiture, money laundering, all kinds of things, so it is not at all without the realm of probabilities that people who work for the Government at later stages could be sought out as experts by foreign governments.

Senator MATHIAS. And I can recall over the years not only Attorneys General but other officials, particularly the Department of Justice, who had similar invitations. Now, would it matter if he got paid? Under your testimony, I assume it would not.

Mr. TROTT. With respect to foreign entities, the compensation does not seem to be anything that would make any difference.

Senator MATHIAS. So here we are saying to a man who has held some of the—a man or woman who has held one of the highest jobs under our Constitution, that they are prohibited from doing this kind of work, which might be highly desirable from the point of view of the United States, and if they do it they are in jeopardy of being accused of a crime.

Mr. TROTT. And this again emphasizes that the brush that is being used here is just far too broad.

Senator MATHIAS. We have to think in the Congress of the long-range interests of the United States of America. Do you think this is in the long-range interests of the United States of America, to prohibit American citizens from acting in this kind of position?

Mr. TROTT. I do not believe so, Senator, and I think that unintentionally there seems to have been something that has crept in here, that there is something wrong about having anything to do with a foreign entity. I do not think that is necessarily the case. As a matter of fact, more often than not it is the other way around.

Senator MATHIAS. The same thing would be true, is it not, of a Secretary of Agriculture who was asked to participate in a rural electrification program in some other country, he would be prohibited?

Mr. TROTT. Yes.

Senator MATHIAS. Assuming we are talking within the time, whether that is a lifetime or whether it is 10 years.

Mr. TROTT. Yes.

Senator MATHIAS. Let me ask another question. Let us say an Assistant Secretary of State for the Middle East has a daily working relationship with an ambassador from a country in the Middle East. The Assistant Secretary leaves office and goes on to other things. Two years after he has left the Department of State, the ambassador with whom he was formerly on a close working basis calls him up and that ambassador is involved in some delicate negotiations. The former Assistant Secretary does in fact know the issues, knows the personality. The ambassador asks his advice. How do you think this should be presented to the ambassador? If the Assistant Secretary answers a question, does he not in fact commit a crime?

Mr. TROTT. Mr. Carver.

Mr. CARVER. I am not so sure that he does in that instance, for a couple of reasons. First of all, the invitation from the senior Government official would have to be taken into account in analyzing whether or not he violated the law.

Senator MATHIAS. But under section 207(c)(3)(b), is there not a prohibition from giving advice or assisting in any way a foreign entity for a period of 10 years? The language I think is employed by or advises.

Mr. CARVER. I think that is fair to say and I think it would at least create a question. I think it would create a question, but I think that the way you have—

Senator MATHIAS. So again, a former high official of Government would be in jeopardy?

Mr. CARVER. Would at least be in a questionable situation; yes, sir.

Mr. TROTT. And one which I as a lawyer in private practice might counsel against.

Senator MATHIAS. Do not take the risk.

Mr. TROTT. Do not take the risk, that is correct.

Senator MATHIAS. Tell your old friend no.

Mr. TROTT. Be careful.

Senator MATHIAS. One more, final question. Let us leave the high altitudes of the Cabinet and the sub-Cabinet and get down to real life. Let us say we have a doctor of the Public Health Service, that he leaves the United States Public Health Service and is offered a job by the Government of Thailand or Laos or Cambodia or whatever, specifically for the job of going to refugee camps and providing medical attention for the refugees. Would he be in jeopardy?

Mr. CARVER. Well, he certainly would be under the original bill, as the bill is originally drafted. There is the exception in the new amended version of the bill for providing service of a compassionate nature or purely charitable nature. However, the representation of the Government of Thailand would raise a question.

Senator MATHIAS. That is why I posed it as being an employee of the Government of Thailand.

Mr. CARVER. I understand that. I do appreciate that, and it would again raise a substantial question of the propriety of the representation.

Senator MATHIAS. Senator Biden, do you have any questions?

Senator BIDEN. No.

Mr. McCONNELL. Mr. Chairman, I have a prepared statement, but I do not have any questions.

Senator MATHIAS. Without objection, your opening statement will be placed at the beginning of the record.

Let me ask you one final hypothetical question which may be of some assistance to members of my own staff, since we have legal advice available. Let us say that a member of my staff leaves the Senate, leaves Capitol Hill, and some 6 months or so later he writes me a letter and he says, "Dear Ex-Boss, please support the Thurmond bill, S. 2334." Now, let us assume that when he was on my staff he was paid at roughly a GS-12 rate or as close as you can come under our different system. By sending that letter, has he committed a crime? I would refer you to section 207(b)(2), which makes it a crime to make a written communication with an intent to influence one's former agency within a year.

Mr. CARVER. That is correct, and that requires no proof of compensation.

Senator MATHIAS. And if he were just a citizen, I mean he was interested, he thought the Thurmond bill ought to be supported, he had no ulterior motive, he was not being paid for it, he is just trying to influence his former employer.

Mr. CARVER. Well, the way you have stated it, it would be a prohibited act under the statute.

Senator MATHIAS. It is a prohibited act. So notwithstanding the terms of the Constitution and the right to petition the Congress and all of that, we are setting up a problem.

Senator BIDEN. I have one question.

Senator MATHIAS. Senator Biden.

Senator BIDEN. I have one question, Mr. Chairman. Actually, I have several questions, but I will not keep the panel. I apologize for being late, and ask if I could submit two questions in writing.

Senator MATHIAS. Without objection.

[The questions Senator Biden referred to follow:]

RESPONSES TO SENATOR BIDEN'S QUESTIONS

1. Q. At the prior hearing on S. 2334, Deputy Assistant Attorney General Keeney testified that the Department prosecuted only 5 out of 100 cases referred to it in the last five years under the existing conflict of interest statute, 28 U.S.C. section 207. Why have there been so few prosecutions?
- A. About 30% of the approximately 100 matters referred to the Department as Section 207 matters were declined after a determination that no section 207 offense had been committed.

Other declinations in these matters were made after a determination was made that the matter had no prosecutive merit for one or more of the following reasons:

- * No evidence of venal conduct;
- * No evidence of tangible harm to the government;
- * No evidence of gain to the violator or to the party represented by the violator;
- * Strong legal defenses;
- * Strong factual defenses;
- * The authorized punishment would be disproportionate to the offense or the offender;
- * Substantial likelihood of an acquittal if prosecution was undertaken, and
- * The existence of administrative actions as an adequate alternative to criminal prosecution under the circumstances of the particular matter at issue.

- 1a) Q. Are there ways in which the statute can be revised to make it easier to enforce?
- A. The statute might be easier to enforce if it were amended to provide misdemeanor penalties for knowing violations and if subpoena power were given to the Department for Section 207 (j) proceedings.

- 1b) Q. As I understand it, there have also been few cases prosecuted under 18 U.S.C. section 208. Again, is there a problem with that statute?
- A. We have no particular problems with Section 208. However, the statute might be clarified through the addition of definitions for the following terms: "negotiating or arranging concerning prospective employment", "minor child", and "spouse".
2. Q. At the prior hearing, I asked Mr. Keeney for information about noncompliance with the Foreign Agents Registration Act which he promised to provide. Can I have the information now?
- 2a) Q. According to the attached article, a former director of the Public Integrity Section has estimated that 30 to 60% of foreign agents working in this country have not registered. Why then have there been no prosecutions for nonregistration?
- A. On May 22, 1986, I forwarded the enclosed response to Chairman Thurmond. After you raised the question at the June 26 hearing, a representative of the Office of Legislative Affairs forwarded a copy to Scott Green of your staff. I hope the enclosed letter is responsive to your inquiry.
- 2b) Q. If it is difficult to enforce a registration statute like the Foreign Agents Registration Act, won't it be even more difficult to enforce a substantive prohibition of foreign representation, as S. 2334 would impose?
- A. Given the difficulties in enforcing a registration statute like the Foreign Agents Registration Act, it may well be more difficult to enforce a substantive prohibition of foreign representation, as the original S. 2334 would impose, depending upon how representation is defined. An outright ban on open representation, or direct contacts, would not be difficult to enforce, but if the intention of the bill is to prohibit former officials from aiding or assisting a foreign government in any way, the ban will be very difficult to enforce. It is easier to enforce a prohibition on an individual contacting a government agency for a certain period of time than it is to enforce a prohibition on the same individual assisting a foreign government by being a consultant to a research company, which may assist foreign governments indirectly, for example, through a law firm. The indirect agents are difficult to detect in the FARA context and the original S. 2334 would be broader and thus more difficult to enforce than FARA in this situation.

Senator BIDEN. But there is one question I would like to ask you now. The last time we had a hearing on this, Assistant Attorney General Keeney was here and I requested some information about noncompliance with the Foreign Agents Registration Act which he indicated he would provide. We have yet to have that information. I wonder if—not that you will have the answer as to why I do not, or maybe you do—is there a reason?

Mr. TROTT. I believe that has already come across my desk and it should be in transmission. I think that is the case, but I will double-check when I go back, Senator, and make sure that is provided to you as quickly as possible.

Senator BIDEN. Thank you.

Senator MATHIAS. Mr. Trott, just a couple of very quick general questions. The bill refers to a foreign entity, and that is important since that is the prohibition, assisting a foreign entity. Is the United Nations a foreign entity?

Mr. TROTT. It very well may be. It is not a domestic entity. If anything other than a domestic entity is a foreign entity—

Senator MATHIAS. Is it an entity?

Mr. TROTT. I suppose so.

Senator MATHIAS. What about WIPO? WIPO is one of our favorite organizations around here, the World Intellectual Property Organization.

Mr. TROTT. I cannot answer that question. Do you know the answer to that?

Senator MATHIAS. We are a member of it, so there is a domestic aspect to it. We do business with them. I do not know either.

What about a trade association which has 51 percent of foreign membership, is that a foreign entity?

Mr. TROTT. [No response.]

Senator MATHIAS. Suppose Attorney General Meese bought an Israeli bond, is that assisting a foreign entity?

Mr. TROTT. I doubt it.

Senator MATHIAS. Why would you doubt it? It is certainly helpful to them.

Mr. TROTT. I think possibly the reason why I doubt it is that the example itself shows again how this is not linked to anything that really creates a potential for a conflict of interest or abuse of influence, but that it—

Senator MATHIAS. The prohibition, if I can quote the words, is against assistance to a foreign entity, and if buying bonds is an assistance and if Israel is a foreign entity—

Mr. TROTT. If you are right, then that is another reason why this legislation is far too broad. I doubt that we would construe the language of even the bill as proposed to encompass that type of a situation, since it is so attenuated, but once again it raises serious questions.

Senator MATHIAS. Let me ask you one final question. It has been suggested that one of the reasons that the Ethics in Government Act is not as effective as it might be is because it is a criminal statute. The Government might act to enjoin certain improper conduct that might not rise to the level that would justify the stigma of a criminal prosecution and of a criminal conviction, at least some people make that argument.

Now, what is your view? Do you think we should place more emphasis on civil sanctions in this area? Could we change some of the sanctions in this bill to civil sanctions so that the Government could get an injunction and an accounting of fees received, perhaps even require rescission of fees, perhaps nullification of contracts, that kind of thing?

Mr. TROTT. I think that would generally be an approach that would be acceptable from our standpoint. Whenever one reaches into the arena of *malem prohibitem* offenses and starts describing conduct as a crime that is not *malem in se*, that it suggests that the civil approach ought to be looked at, rather than only the criminal approach, I am not saying that in the area of the Ethics in Government Act, there are civil penalties that attach to those types of actions also.

Senator MATHIAS. Well, I would generally personally agree with that approach. Is there anything you would like to offer, any changes you would suggest in the Ethics in Government Act at this point that might bear on this general subject?

Mr. TROTT. Senator, not at this time. However, we would be pleased to work with you or your staff on that subject if you are interested in looking at it.

Senator MATHIAS. If there are no further questions, then I would like to reserve for the chairman the right to submit some questions to you in writing and request that you respond to them promptly.

Mr. TROTT. Certainly.

Senator MATHIAS. And other members of the committee who under the extraordinary circumstances under which we have been operating in the last 24 hours might not have gotten here would have the same privilege.

Thank you very much.

Mr. TROTT. You are welcome.

[The questions referred to follow:]

RESPONSES TO SENATOR SPECTER'S QUESTIONS

1. Q. What would be the effective date of this bill?
A. The effective date of S. 2334, as introduced, would be upon enactment. However, we understand that the bill as amended by the Committee would become effective six months after the date of enactment.
2. Q. Have the proposed penalties been modified from the provisions discussed earlier -- up to two years in jail and \$250,000 in fines?
A. The bill, as approved by the Committee, provides a penalty of up to five years imprisonment for willful violations. Under the Fine Enforcement Act, fines up to \$250,000 could be levied.
3. Q. Does the Justice Department agree with these proposed penalties, or have suggestions to change them been submitted or discussed?
A. The Department has made no suggestions for changes to the proposed penalties. However, we have discussed changes with the Committee staff, including reducing the penalty in the current statute to that of a misdemeanor for knowing conduct and providing for felony sanctions for willful violations.

Senator MATHIAS. We will ask that Mr. Michael G. Kozak, the principal Deputy Legal Adviser of the Department of State, and Mr. H. Lawrence Garrett, General Counsel of the Department of Defense appear as a panel.

Gentlemen, we will ask in the interest of time that you restrict your statement to 5 minutes so that there is some opportunity for questions on the part of the committee.

**STATEMENT OF MICHAEL G. KOZAK, DEPUTY LEGAL ADVISER,
DEPARTMENT OF STATE, AND H. LAWRENCE GARRETT III, GEN-
ERAL COUNSEL, DEPARTMENT OF DEFENSE**

Mr. GARRETT. Do you have any preference, Mr. Chairman, as to who leads off?

Senator MATHIAS. No, we will let you decide that.

Mr. KOZAK. Mr. Chairman and members of the committee, I am pleased to appear before you today to discuss an issue that has been with us since the days of the Founding Fathers—how to attract people of the highest integrity to Government, and how to insure that they maintain the highest standards of integrity both during their public service and after they return to private life.

I would like to begin by setting out some general considerations regarding restrictions on postgovernment employment and then focus on some specific questions to show why the Department of State is troubled by the amendments now pending. I will address my comments to S. 2334 as it would be modified by a substitute amendment now before the committee.

Over the years, our country has developed a complex structure of laws and regulations that defines proper behavior for employees of the Government and for those who seek to influence it. A number of statutes were first enacted in 1872 in response to the rampant corruption in connection with the procurement of goods and services and the handling of claims against the United States during the Civil War.

These laws formed the basis of a comprehensive statutory scheme enacted in 1962. The present postgovernment requirements are derived from the 1978 amendments, which substantially tightened the 1962 provisions in that area. The intent of current law is clear: to promote honest government and impartial decisions; to prevent corruption and other official misconduct before it occurs; and to penalize wrong-doing once it is found.

Recent reports have again raised widespread concern about improper and unethical lobbying. We deeply share this concern. We can neither condone nor tolerate the use of Federal employment to gain privileged information to be later used for profit in the private sector. Nor can we tolerate the practice of improperly selling influence and access. But at the same time, we cannot afford disincentives to honest and publicly spirited citizens entering Government service. The balance between encouraging public service and deterring abuse of public office is not easy to strike.

Even when the system seems to be working well, we should not become complacent. Thus, we welcome the opportunity to take stock of what current law prohibits and whether its enforcement is

sufficient to restrain improper practices. Our basic approach can be summarized as follows:

If as a result of this process loopholes are found to exist, we will work with you to close them. If current enforcement is lax, we will take steps to make enforcement more vigorous. But we must be careful to insure that any proposed changes will in fact increase Government integrity or otherwise advance the public interest. We must insure that we do not make into criminal violations those activities which are inherently legitimate and which enhance the functioning of good government.

In considering this entire issue, we must keep in mind that the very structure of our free society is based upon the concept that it is in the public interest that individual citizens should come into and leave Government service periodically.

Political appointees, like the President and members of Congress they serve, enter and leave public service in accordance with national elections. While career civil servants are insulated from such electoral shifts, it is both expected and, I believe, desirable, that many people will during their careers work both in Government and in the private sector.

Under our system, Government service is part of the free marketplace of employment, as well as an important means by which the political choices of the American people are represented.

The healthy exchange of experience and expertise between Government and the private sector serves the public interest, both in political and economic terms. We cannot afford to create overly broad impediments to the infusion of new blood and ideas into our Government, just as we must not create unjustified incentives for the departure of career employees with essential experience and skills. I am concerned that the proposed amendments do just that.

The U.S. Government, by and large, functions with competence and integrity. Traditionally, we have believed in the free exchange of ideas. For each former Government employee who seeks to lobby the government in one direction, there is another former employee lobbying the government in another, along with hosts of other private citizens.

The U.S. Government is well able to sort through these various views and influences. A former employee may have learned in some ways how to make a more persuasive case to his former agency and colleagues. But there are many others in Washington who have this type of expertise, or who may have special influence for various reasons quite unrelated to Government employment.

We must honestly ask whether the U.S. Government—the Federal departments and agencies, the Congress, and our courts—is really so open to abuse by its former employees, and so defenseless, that new and sweeping restrictions are required. And more importantly, we must consider the dangers and costs if we go too far in creating a wall between the Government and the private sector. We believe the proposed bill goes too far. The judgment of Congress up until now, which we believe to be sound, has been to focus on the areas of abuse, while preserving the benefits of our current system.

The vice of improper lobbying is not that ex officials seek to communicate with the Federal Government on behalf of another,

whether foreign or domestic, but that some ex officials may gain improper access not available to others, use inside information gained from their Government employment, or exert personal influence unrelated to the merits of their case.

If the Government's decisionmaking process is flawed, and improper influence is brought to bear, it makes no difference who is doing the lobbying, a former employee, a personal friend of a Government official, or a campaign contributor.

But if the process is working properly, the Government profits by hearing all points of view prior to reaching an impartial conclusion. We must resist broad prohibitions that limit an ex official's ability to impart information, and to seek employment for which he is qualified, where no danger exists of use of inside information or improper personal influence.

Mr. Chairman, I propose to submit the rest of my prepared statement for the record and I would like at this time to associate the department with the statements the Assistant Attorney General made in commenting on the specifics of the bill.

Senator MATHIAS. Without objection, your full statement will be placed in the record, and I appreciate your keeping an eye on the red light up here.

[The prepared statement of Mr. Kozak follows:]

STATEMENT OF

MICHAEL G. KOZAK
DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE

I am pleased to appear before you today to discuss an issue that has been with us since the days of the founding fathers -- how to attract people of the highest integrity to government, and how to ensure that they maintain the highest standards of integrity both during their public service and after they return to private life. I would like to begin by setting out some general considerations regarding restrictions on post-government employment and then focus on some specific questions to show why the Department of State is troubled by the amendments now pending. I will address my comments to S. 2334 as it would be modified by a substitute amendment now before the Committee.

Over the years, our country has developed a complex structure of laws and regulations that defines proper behavior for employees of the government and for those who seek to influence it. A number of statutes were first enacted in 1872 in response to the rampant corruption in connection with the procurement of goods and services and the handling of claims against the United States during the Civil War. These laws formed the basis of a comprehensive statutory scheme enacted in 1962. The present post-government requirements are derived from the 1978 amendments, which substantially tightened the 1962 provisions in that area. The intent of current law is clear: to promote honest government and impartial decisions; to prevent corruption and other official misconduct before it occurs; and to penalize wrongdoing once it is found.

Recent reports have again raised widespread concern about improper and unethical lobbying. We deeply share this concern. We can neither condone nor tolerate the use of federal employment to gain privileged information to be later used for profit in the private sector. Nor can we tolerate the practice of improperly selling influence and access. But at the same time, we cannot afford disincentives to honest and publicly spirited citizens entering government service. The balance between encouraging public service and deterring abuse of public office is not easy to strike.

Even when the system seems to be working well we should not become complacent. Thus, we welcome the opportunity to take stock of what current law prohibits and whether its enforcement is sufficient to restrain improper practices. Our basic approach can be summarized as follows: if as a result of this process loopholes are found to exist, we will work with you to close them. If current enforcement is lax, we will take steps to make enforcement more vigorous. But we must be careful to insure that any proposed changes will in fact increase government integrity or otherwise advance the public interest. We must insure that we do not make into criminal violations those activities which are inherently legitimate and which enhance the functioning of good government.

In considering this entire issue, we must keep in mind that the very structure of our free society is based upon the concept that it is in the public interest that individual citizens should come into and leave government service periodically. Political appointees, like the President and members of Congress they serve, enter and leave public service in accordance with national elections. While career civil servants are insulated from such electoral shifts, it is both expected and, I believe, desirable, that many people will, during their careers, work both in government and in the private sector. Under our system, government service is part of the free marketplace of employment, as well as an important

means by which the political choices of the American people are represented. The healthy exchange of experience and expertise between government and the private sector serves the public interest, both in political and economic terms. We cannot afford to create overly broad impediments to the infusion of new blood and ideas into our government, just as we must not create unjustified incentives for the departure of career employees with essential experience and skills. I am concerned that the proposed amendments do just that.

The United States Government, by and large, functions with competence and integrity. Traditionally, we have believed in the free exchange of ideas. For each former government employee who seeks to lobby the government in one direction, there is another former employee lobbying the government in another -- along with hosts of other private citizens. The U.S. Government is well able to sort through these various views and influences. A former employee may have learned in some ways how to make a more persuasive case to his former agency and colleagues. But there are many others in Washington who have this type of expertise, or who may have special influence for various reasons quite unrelated to government employment. We must honestly ask whether the United States Government -- the federal departments and agencies, the Congress, and our courts -- is really so open to abuse by its former employees, and so defenseless, that new and sweeping restrictions are required. And more importantly, we must consider the dangers and costs if we go too far in creating a wall between the government and the private sector. We believe the proposed bill goes too far. The judgment of Congress up until now -- which we believe to be sound -- has been to focus on the areas of abuse, while preserving the benefits of our current system.

The vice of improper lobbying is not that ex-officials seek to communicate with the federal government on behalf of another, whether foreign or domestic, but that some ex-officials may gain improper access not available to others, use inside information gained from their government employment, or exert personal influence unrelated to the merits of their case. If the government's decision-making process is flawed, and improper influence is brought to bear, it makes no difference who is doing the lobbying -- a former employee, a personal friend of a government official, or a campaign contributor. But if the process is working properly, the government profits by hearing all points of view prior to reaching an impartial conclusion. We must resist broad prohibitions that limit an ex-official's ability to impart information, and to seek employment for which he is qualified, where no danger exists of use of inside information or improper personal influence.

The Pending Amendments

The Committee is now considering a broad revision of one of the current laws governing activities of former government employees, 18 U.S.C. section 207. The amendments before the Committee represent in some respects rather drastic changes in the rules governing public service.

Let me summarize briefly how the amendments before the Committee would alter current law. Section 207 now contains four general restrictions on the post-employment activities of former government employees. Two are applicable to all former employees:

- a life-time ban on representing any other person (except the U.S.) before a U.S. Department, agency or court in any particular matter involving specific parties in which the employee participated personally and substantially (section 207(a)); and

-- a two-year ban on representing any other person (except the U.S.) before a U.S. Department, agency or court in any particular matter involving specific parties which was actually pending under the employee's official responsibility during his last year with the Government, whether or not the employee participated in or had knowledge of the matter (section 207(b)(i)).

Two additional restrictions apply only to former "senior" employees, that is, persons at Executive Schedule pay rates or equivalent, and others in comparable designated positions. These additional restrictions are:

-- a two-year ban on helping to represent any other person (except the U.S.) by being present at an appearance of another before a U.S. Department, agency or court on any particular matter involving specific parties in which the employee participated personally and substantially (section 207(b)(ii)); and

-- the so-called "cooling off period" -- a one-year ban on attempting to influence the employee's former Department or agency on any particular matter pending before, or of substantial interest to, that Department or agency, regardless of the employee's prior involvement in the matter (section 207(c)).

Although the amendments now before the Committee would retain the current lifetime ban in section 207(a) on representations involving particular matters in which an employee participated personally and substantially, the other restrictions would be revised, to be greatly expanded in some respects, but inexplicably narrowed in others.

These proposed amendments would extend the current one-year cooling off period down to officials above GS-10 or equivalent, and would expand the scope of its prohibition for higher officials over GS-14 or equivalent. The amendments would apply the following to all executive branch, judicial and congressional employees leaving government, as well as members of Congress:

- All employees, officials and members over GS-14 would be subject to a one-year ban (two years for members of Congress) on any communication with any branch of the federal government, including the executive, Congress, and the courts, on any matter where they are representing another person for compensation, regardless of the employee's prior involvement in the matter, while
- GS-11 to GS-14 employees would be subject to this ban on contact only with respect to their former department or agency, but apparently without regard to whether or not compensated.

In addition, the proposed revisions would add special limitations on post-employment activities in connection with foreign entities:

- a ban of varying periods from being employed by, advising, representing or assisting in any way, directly or indirectly, any "foreign entity" or attempting to influence any branch of the federal government on its behalf, whether or not remunerated (10 years for the highest Executive officials, 5 years for members of Congress, and 2 years for all mid-level employees of the three branches only if remunerated for their services).

"Foreign entity" is defined very broadly, to include not only foreign government interests, but U.S. branches of foreign companies, foreign subsidiaries of U.S. companies, and all persons located abroad who are not U.S. citizens. It is unclear as to inclusion of international organizations such as the UN and specialized agencies.

These same amendments now under consideration, on the other hand, would quietly lift the current two-year bars on representation or presence on matters within an Executive Branch employee's official responsibility or on which he participated personally and substantially (section 207(b)).

In considering these amendments, we in the State Department have asked several questions: Do we have a need for these changes? Will these amendments solve this need without also intruding into areas where there is no governmental interest? Will these amendments encourage experienced employees to leave government before enactment or effective date? Will they discourage others from taking their place? Let me share with you our thoughts on these issues.

First, it appears that current law is already adequate to prohibit abuse, or at most requires relatively minor changes

A primary purpose of the current conflict of interest law is to protect the integrity of the decision-making process of the government so that it is honest, decisions are impartial, and corruption and other misconduct are prevented. Existing law is broad and comprehensive and, I believe, well-considered. It bars improper influence by those who leave and prohibits preferential treatment by those who remain.

Current law (including regulation) broadly prohibits ex-officials from lobbying the government on matters they worked on or supervised while in government. It limits a former official's ability to use inside information for private gain. It bars a government employee from handling a matter in which a prospective employer stands to gain. It provides special disclosure requirements to protect against hidden foreign interests. It already prohibits a current government employee from providing preferential treatment to an ex-official, or any person whatsoever.

-- Requirements for those leaving government

As a result of the considerable examination of this area by Congress in the late 1970's, a whole series of criminal provisions now prevent lobbying on behalf of a client for varying lengths of time depending upon the degree of prior government involvement of the ex-official. For example, a government officer who worked on a particular contract could not, after leaving the Government, ever come back before a U.S. Department, agency or court to represent a private firm as to that contract. See 18 U.S.C. 207(a). Likewise, if a company were involved in a particular negotiation, a former official who handled that negotiation for the government could not ever represent any company before the U.S.G. as to that specific negotiation. If a former employee had been supervisor for a contract when working for the government, even though he did not personally handle it, he would be barred for two years from representing any private party before the U.S.G. with respect to it. See 18 U.S.C. 207(b)(1).

Senior officials are subject to more stringent criminal constraints. Such a former official may not even be present at an appearance by another representative before the government on a matter on which he worked. See 18 U.S.C. 207(b)(1). In addition, a former senior level official may not, during the first year after government service, represent anyone, including himself, on a particular matter of business (except a purely personal matter or other narrowly-defined excepted matter) before his old agency (see 18 U.S.C. 207(c)). This severe constraint, unlike the preceding ones mentioned, applies just to the agency in which the official served (where the potential for influence would be the greatest) and not government-wide. Moreover, this bar is not dependent on prior involvement or official responsibility; even a matter arising after the official departed the agency is covered for the one year period.

Violators of these post-government constraints may be subject to administrative sanctions in addition to the criminal sanctions. See 18 U.S.C. 207(j). Such disciplinary action could include debarment from practice before the agency for up to five years. See 22 C.F.R. Part 18 for the State Department's regulations.

The Foreign Agents Registration Act and a special notification statute are also applicable when foreign government representations are involved. See 22 U.S.C. 611-621 and 18 U.S.C. 951. These laws, which are administered by the Justice Department, require registration in order to engage in various kinds of representational activities on behalf of foreign principals and provide for notification to the federal government which is available to the public. Such activities can thus be monitored and any abuses more easily detected.

Several requirements limit a former employee's ability to use inside information for private gain. The lifetime bar on lobbying the government on particular matters an ex-official personally handled, the two limited post-government bars and the one-year cooling off period for senior officials serve as major deterrents to capitalizing on inside information. During these time periods, the inside information and close professional relationships of the former officials tend to wane, thereby decreasing their value and diminishing the ability improperly to influence or gain undue access. In addition, as to classified information, specific statutes bar disclosure. See 18 U.S.C. 798 and 42 U.S.C. 2277. Finally, certain ex-officials may also be subject to continuing constraints on disclosure or use of sensitive government information based on non-disclosure undertakings.

Former government attorneys are subject under the ethics rules governing their profession to a broad constraint against any employment in a matter on which they personally worked, whether or not they are communicating with the government. See Disciplinary Rule 9-101(B) of the ABA Model Code of Professional Responsibility and Rule 1.11 of the ABA Model Rules of Professional Conduct. Neither private gain nor switching sides is condoned under current law.

One of the conflict of interest statutes (18 U.S.C. 208) prohibits an employee from participating personally and substantially in a particular matter in which, to his or her knowledge, any person with whom he or she is negotiating, or has an arrangement concerning prospective employment, has a financial interest. Thus, an employee working on an arms export license matter for the government cannot simultaneously seek a job with one of the munitions manufacturers involved in the license matter.

-- Requirements for those making government decisions

The conduct of former employees is only part of the problem of integrity in government, since former employees are only a small part of the wide range of people and groups seeking to influence government decisions. In many ways more important is how current employees respond to both proper and improper attempts to influence the conduct of their official responsibilities.

Current law prohibits a current employee from giving preferential treatment to anyone -- including former employees -- on pending matters before a government agency. Under Executive Order 11222 and the implementing Office of Personnel Management and particular agency standards of conduct, current employees are subject to a number of ethical requirements which help to insure that fair and equal treatment is accorded to all persons coming before them. Employees are under a duty not to take any action that could result in, or give the appearance of, among other things, giving preferential treatment to any person, losing independence or impartiality, or affecting adversely the public's confidence in the

government. Similarly, there is a general prohibition on receipt of gifts from persons having or seeking business before the agency.

These standards of conduct are published regulations with binding effect. (See 22 C.F.R. Part 10 for the State Department regulations.) Any knowing violation subjects an employee to possible disciplinary action, including separation for cause. The constraints on those within the government, coupled with the constraints on those who leave it, constitute an effective safety net to ward off most attempts to seek favored treatment or other impropriety as well as to take appropriate remedial action when warranted.

Second, the pending amendments would broadly interfere with legitimate behavior, would add little to the integrity of government, and would eliminate useful requirements.

When the Congress enacted the 1978 revisions to section 207, it weighed carefully the necessity for further limitations to prevent abuse against the harm which might be caused to individuals and to the system by undue restrictions. It does not appear that the experience to date under the 1978 amendments truly calls for a radical shift in the balance which was struck. In making the 1978 revisions, Congress determined that only truly senior officials had such potential influence as to warrant a general prohibition on contact with the former agency for a cooling off period. It does not appear that recent events have seriously called into question the soundness of Congress' earlier judgment. It does not appear that current post-employment restrictions are seriously inadequate, nor that such sweeping revisions as are now under consideration are necessary to remedy such loopholes as might exist.

The reach of the proposed amendments is extremely broad, going well beyond that I believe appears necessary to preserve the integrity of the government processes. In addition, the amendments appear premised on the dubious assumptions that thousands of middle and upper level employees who leave government each year have such power to influence the U.S. Government, or at least their own former department, that they must be essentially quarantined for one to two years. I have provided below several examples of what appears on preliminary study to be the reach of these changes.

The amendments would extend the one year "cooling off period", which bans contacts with the former employing Department or agency, to employees over GS-10 of all three branches -- not just to senior employees of the Executive Branch (such as Deputy Assistant Secretaries and above for the State Department). For persons over GS-14, contacts with the entire federal Government, including Congress, would be prohibited, even when there is no nexus, no connection with the prior employment.

This absence of any relationship between the employee's former job and the scope of the prohibition can lead to absurd results for departing employees that contribute little to correcting problems of improper influence. For example, a lawyer formerly retained by the Defense Department to draft U.S. Government contracts would be barred for compensation from talking to the State Department on a visa or from lobbying the Congress on tax reform legislation.

Under the proposed amendments, when the former employee is acting on behalf of a foreign entity, as opposed to a U.S. entity, this general ban on contact applies for two or more years rather than only one year. As I mentioned earlier, foreign entity is defined very broadly to include not only foreign government interests, but U.S. branches of foreign companies, foreign subsidiaries of U.S. companies, and all persons located abroad who are not U.S. citizens.

We question the logic of this sweeping distinction between U.S. and foreign entities. Under the proposed new section 207, it appears that a State Department official could still, a year after he retires, lobby Congress on behalf of an American manufacturer on a trade issue in which he was personally and substantially involved, but he would be prohibited for two years from contacting the Department of Labor on behalf of a General Motors subsidiary in Canada. In addition, he could not even work for such a subsidiary, even if his job had nothing to do with representation before the U.S. Government.

The proposed prohibition for ex-officials on employment by, advising, representing, or even assisting indirectly a foreign entity seems far to exceed any legitimate government interest and is unrelated to any argument that such an association would undermine government decision-making. This amendment would prohibit all employment by or on behalf of foreign entities and persons for two or more years without regard to any possible interest of the U.S. in the employment. As a practical matter, former government employees could not take a job abroad during the periods of prohibition -- not selling airline tickets for a foreign airline, nor waiting tables in a Parisian bistro, nor working for a foreign subsidiary of Ford. Working in the United States, at whatever location and in whatever occupation, a former employee couldn't have a foreign client. Indeed, a Vice-President of IBM may even need to recuse himself from assisting the company's foreign subsidiaries. We consider this provision in particular to have grave constitutional defects.

We also question why it is necessary to have such a provision, if there is also a separate ban on contact with the U.S. Government during the same period. In a number of situations, it could be in the United States national interest for a former employee to be employed by or assist a foreign entity. We are concerned, for example, whether these amendments would prohibit U.S. Government employees from working for international organizations. Current law (e.g., 5 U.S.C. 3184-89) recognizes that it is often to the advantage of the United States to be able to place U.S. Government employees with such organizations. (See also 5 C.F.R. 737.23(b)(2)). Under the proposed legislation, however, it appears that international organizations could fall within the definition of foreign entity and such placement would be barred during the periods of prohibition.

As the above examples demonstrate, this legislation's reach far exceeds the reasonable prospects of possible abuse. As recognized in the present law, the possibilities for abuse are greatest when a former employee is dealing with the same people and issues in his private capacity with which he dealt in his official capacity. This is the more usual case, since people generally continue to work during their careers in a given area of knowledge and expertise.

The proposed amendments also appear to have an inconsistent effect. On the one hand, the proposed amendments seem in general unduly sweeping. On the other hand, however, they would actually weaken the current restrictions in some respects. In the areas where the potential for abuse is greatest -- when the contacts concern matters in which the employee was actually involved or for which he had official responsibilities -- this legislation would actually eliminate certain prohibitions on contacts now in law.

Current law provides a two year ban on contacts with the executive and judicial branches regarding particular matters pending under the employee's official responsibility during his last year of government employment. This legislation would substitute a more general ban on contact, but this ban would only apply for one year. Thus, after a year, a former employee could lobby his former subordinates on various matters over which he was responsible, where this is prohibited under current law (See 18 U.S.C. 207(b)).

Moreover, the proposed amendments could open up significant loopholes for senior officials in the current one-year cooling off ban and undermine its clarity and effectiveness. Under current law, any contact which is not purely informational is presumed to be prohibited. There are only certain narrow exceptions, for example, where an individual is acting on behalf of his strictly personal interests such as his own tax returns or retirement annuity. Under the proposed revisions, however, contacts during the one-year cooling-off period would not be prohibited unless the individual is acting on behalf of another person for compensation. So under the revisions, a former senior employee could apparently call up his former colleagues and lobby on any matter except one in which he was personally and substantially involved, and it would be extremely difficult to show whether the contact is on behalf of someone else for compensation. If the former official is lobbying on behalf of his own business interests, this appears to be permitted. If he is lobbying on behalf of a friend, as a favor, this would appear to be permitted, or at least it would be hard to establish that it is not.

In this respect, the proposed new prohibitions are weaker than the current restrictions. For senior officials with greatest influence, significant personal business interests, or numerous powerful friends, it seems that there would be possibilities for lobbying under the proposed restrictions which are prohibited under current law. For lower-level officials, however, the restrictions would inexplicably be much more severe.

We are also concerned that the proposed amendments would eliminate certain existing exceptions which would appear to be necessary and useful. Under current law, the present subsection 207(f) provides an exception to the bans on contact for former employees to furnish scientific or technological information to the Government. Under the amendments, this exception would be allowed only to the lifetime ban on matters in which the employee participated personally and substantially. Thus, a former NIH researcher on anti-virus drugs who goes to work for a pharmaceutical firm could apparently not provide the results of his further research to the Food and Drug Administration, or to Congress during his first year after departing government, because the FDA or Congress might be influenced by such information. The present subsection 207(h), which provides that employees are not prevented from giving testimony under oath, or making statements under penalty of perjury, would be eliminated. In some cases, eliminating this exception could, it seems, lead to injustice.

Third, the pending amendments could encourage a significant exodus of the best government officials, and discourage others from taking their place.

Individuals have long debated whether the Ethics in Government Act and other ethical provisions have been obstacles to the Federal Government's ability to employ and retain highly qualified individuals. Because of the complexity of the factors -- legal, political, economic, social, and personal -- which can affect an individual's decision to accept or reject an offer of Federal employment, it has been difficult to determine what effect any ethical requirement may have had on an individual's refusal to enter government service. To date, the current law, as strengthened in 1978 as to post-government constraints, has struck a fair balance between the need to assure honest government, and the need to avoid deterring capable people from entering or continuing to serve the government.

The post-government amendments under consideration by the Committee will have a more predictably negative effect on federal employment. As discussed above, the pending amendments

will broadly limit a professional government official's future employment opportunities. He will face a one-year "cooling off period" on contacts with all three branches of the federal government, even when there is no nexus with his government position, and no specific matter at issue. He will face a two-year ban on working for, acting on behalf of, or assisting any foreign entity, even if owned by U.S. persons. He effectively cannot work abroad, nor can he have foreign clients in the United States. If the individual is in a profession, such as law, accounting, or business, where private practitioners are routinely in contact with the federal government at some point in a year, these requirements would be pervasive impediments to post-government employment.

This will have a significantly adverse effect in my own office. For example, we compete for new lawyers with firms paying \$30,000 more than our starting pay. Many come with an expectation of staying a few years and then going into private practice. They do this not because the experience or contacts they gain in our office is particularly marketable. They do it because they want to experience public service in the best sense of the word and are willing to make a sacrifice to do so. If I tell these individuals that they will not only suffer a financial penalty while working for the government, but only face reduced job opportunities for one to two years after they leave, I fear we will lose the top quality graduates we now attract. These broad constraints are bound to be a disincentive to government service by individuals in the private sector. They are also powerful incentives for the most able government employees to leave now and put their experience and skills to work in the outside world. The risk that these predictions will come true is an unacceptable price to pay for overbroad constraints that I believe will do little to improve the integrity of government, especially given the rigor of current prohibitions on ex-officials.

I would be glad to answer any questions you may have.

1487K



United States Department of State

Washington, D.C. 20520

JUL 4 1986

Dear Senator Thurmond:

This is in response to your letter of June 18, 1986, to Mr. Michael Kozak, Principal Deputy Legal Adviser of the Department of State, in which you enclose an additional question submitted by Senator Specter regarding the hearing held on June 18, 1986 on S. 2334, the Integrity in Post Government Employment Act of 1986.

Enclosed please find Mr. Kozak's response to this question. I would also like to take opportunity to thank you and the other members of the Committee for giving the Department of State the opportunity to present testimony on this legislation.

With best wishes,

Sincerely,

A handwritten signature in cursive script that reads "J. Edward Fox".

J. Edward Fox
Assistant Secretary
Legislative and Intergovernmental Affairs

Enclosure:

Mr. Kozak's response regarding Integrity in Post Government Employment Act of 1986.

The Honorable
Strom Thurmond,
Chairman, Committee on the Judiciary,
United States Senate.

Q: I UNDERSTAND THAT THE PROHIBITION FOR TEN YEARS HAS BEEN EXTENDED TO COVER A GREATER RANGE OF HIGH LEVEL OFFICIALS. THE FORMER BILL AFFECTED CABINET SECRETARIES, THE DIRECTOR OF THE C.I.A., THE SECRETARIES OF THE ARMED SERVICES, THE DIRECTOR OF THE F.B.I., AND SEVERAL OF THE HIGHEST RANKED WHITE HOUSE OFFICIALS. TO WHOM HAS THE BAN BEEN EXTENDED, AND DO YOU BELIEVE THAT IT SHOULD BE EXTENDED EVEN FURTHER, OR RESTRICTED FROM ITS PRESENT DIMENSIONS?

A: The original version of S. 2334 contained a lifetime ban on persons employed in Executive Schedule Level I and II positions (the Secretary and Deputy Secretary at State) and under Title 3 U.S.C. Sec. 105(a)(2)(A) from being employed by, advising, representing or assisting a foreign entity.

A proposed amended version, which I addressed in my testimony, would have limited this ban to ten years but extended its coverage to specified additional persons: Under Secretaries or Assistant Secretaries of State and Defense, the U.S. Trade Representative and Deputy Trade Representative, the Chairman of the International Trade Administration, the Deputy Director of the C.I.A., and the Director of the F.B.I.

As adopted by the Committee, the ban on employment by or assisting a foreign entity was reduced to three years, and the requirement added that it be for compensation. The coverage, however, was extended from the original version of S. 2334 to all officials at Executive Schedule Level III (Under Secretaries). In addition, as in prior versions of the bill, all officers and employees at or above GS-16 are prohibited for two years from representing a foreign entity in an appearance before the United States or from communicating with the United States, with the intent to influence, on behalf of a foreign entity for remuneration. The definition of "foreign entity," as finally adopted, includes foreign governments, foreign political parties, and controlled entities thereof.

As I indicated in my testimony, the Department of State believes that a general prohibition on employment by or assisting a foreign entity is overly broad, since employment and other relations are prohibited without regard to whether there is any possibility of abuse of the former employment relationship. Such a restriction also seems to assume that high-level government officials, in general, cannot be trusted to work for foreign entities without compromising U.S. Government interests or confidential information. Such a broad assumption seems to us unwarranted. Moreover, with regard to misuse of confidential information, it would appear that individuals at all levels of government, and current employees even more than former employees, may possess sensitive information the disclosure of which can cause significant harm. Accordingly, in the view of the Department of State, it is preferable to tighten enforcement of the various prohibitions on disclosure of confidential information rather than to prohibit certain categories of employment for former high-level officials. As I mentioned in my testimony, the Secretary of State has personally supported strong enforcement measures against persons making unauthorized disclosure.

Senator MATHIAS. Mr. Garrett.

STATEMENT OF H. LAWRENCE GARRETT III

Mr. GARRETT. Thank you, Mr. Chairman. I am here on behalf of the Department of Defense and I wish to express my appreciation to you and the members of the committee to allow me to address the Department's views on the proposed bill, S. 2334, that is presently pending.

I would at this time also like to associate the Department with the views expressed by the Assistant Attorney General as well as those of the Department of State, and be very brief in my remarks to bring to the committee's attention the greatest concern that we have, as well as making the committee aware of some of the legal prohibitions that are unique to the Department of Defense, its employees and officers, that do not exist as to the rest of the Government.

I have a written statement which has been prepared and will be submitted for inclusion in the record.

Senator MATHIAS. Without objection, it will be included.

Mr. GARRETT. The Department shares the concerns expressed by the representatives of the other agencies as well as the concerns of the committee and the chairman in putting forth this bill.

We believe strongly, however, that the current law and the enforcement of that law are sufficient to restrain the practices that appear to be of concern. As pointed out, there is a fully developed body of law dealing with activities of officials and employees after they end their service with the Federal Government. It has been carefully crafted and refined over the years, and it has been our experience—and I can say my experience specifically, having dealt in this area for the last 8 years—that the laws adequately protect the interests of the U.S. Government, its taxpayers, without unduly intruding upon the rights and the interests of those who serve the Government as civilians and/or military members.

There are, as I pointed out, also elaborate laws restricting the activities of former officers and employees specifically of the Department of Defense. For example, retired regular officers of the military departments have restrictions in addition to those found in § 207 (18 U.S.C. § 207). These restrict activities that are considered to be "selling" to the Department of Defense or to the military service from whence they came.

Additionally, last fall the Congress enacted additional restrictions that apply only to officers and employees of the Department of Defense. They go beyond the traditional limitations on representational activities as found in § 207 and prevent presidential appointees from accepting employment; just a flat-out ban on employment for a period of 2 years. There are also elaborate reporting requirements that should help the Department identify and prevent potential conflict-of-interest situations from arising.

Again, we have in this situation a nexus requirement to prevent actual or apparent conflicts from arising. In addition, there is a little-known constitutional provision found in article I, section 9, clause 8 of the Constitution, which prohibits any person holding any office of profit or trust under the Federal Government from ac-

cepting any office or title of any kind from a foreign official or foreign state without the consent of Congress. All retired military personnel, both officer and enlisted, regular and reserve, are covered by this provision, according to the Comptroller General's ruling.

The Congress in its wisdom established machinery for providing a review of applications of retired military members for such foreign employment and the granting of approval in appropriate cases. This is done specifically by the head of the service concerned as well as the Secretary of State or his delegee, and is done routinely in cases where there is no potential for violations of law or conflict of interest.

We received the amended bill late yesterday afternoon and I am not that familiar with the amendments which may be pending and propose to supplement this statement with a more detailed analysis of the bill.

Senator MATHIAS. Let me tell you that we suffer from the same problem.

Mr. GARRETT. Yes, sir. I was going to ask if I could, Mr. Chairman, that we be allowed to express our concerns in a more detailed analysis and urge that the committee not take any action on the bill until the Department has submitted its analysis for your consideration.

Senator MATHIAS. That is a subject for the chairman to address, but I can say that I personally am in full sympathy with your request.

Mr. GARRETT. I merely make the request.

Senator BIDEN. If the Senator will yield, having had the Defense Department on occasion indicate that they are prepared, when they ask to submit something at their leisure, that could be years with you guys.

Mr. GARRETT. It will not be at our leisure, sir.

Senator BIDEN. Well, why do you not tell us, give us an idea what you are talking about, a week?

Mr. GARRETT. A week to 10 days.

Senator BIDEN. Good. Great.

Senator MATHIAS. Let them have years.

Mr. GARRETT. If I may—I see that the light has gone on and I did not really get to the thrust of what I wanted to say, but we are most concerned with the enactment of a new statute, the bill restricting further postgovernment employment will be very counterproductive.

I have had a great deal of experience with the Ethics in Government Act as passed in 1978, and I am sure the committee remembers well the hue and cry that went up by current employees and those who were trying to come into Government as to whether or not they would be able to function and earn a livelihood thereafter.

I strongly feel that, given the broad sweep of this particular bill, that we will revisit that issue in a very serious way, and we in the Department feel that we need most strongly the ability to attract and to retain qualified people to carry out the myriad of tasks that are before us in the Department of Defense, and at the same time allow these people to come into and go out of Government and earn a livelihood.

We see, again because of our experience in 1978 and 1979, which I am sure other witnesses will testify to, that we will be back in that position with this bill.

I would like to say as well that we certainly, in the Department of Defense, the Office of General Counsel would be most happy to work with the committee and the committee staff to fashion some language to address the particular concerns that you have in such a way that it would not be in such a broad and sweeping way.

Thank you.

Senator MATHIAS. Let me ask you each a question. As Mr. Trott testified a minute ago, this bill would repeal some substantial provisions in the existing law. Now, in either the experience of the Department of State or the Department of Defense, have there been such difficulties in the enforcement of the present law that it is imperative that we repeal it?

Mr. GARRETT. Well, I do not think so in the Department of Defense, but the Department, as I said early on, would share the concern of Mr. Trott that these provisions that are presently in law be repealed. We feel that they have a very valid basis in being and would strongly recommend that they remain intact.

They are in my opinion, again having worked on section 207 extensively, tailored specifically to prevent the types of conflict of interest or apparent conflict of interest from arising because the prohibitions primarily deal with activities on the part of someone who has been in Government and left Government, and there is that nexus between what they did in Government and what they are trying to do thereafter.

Senator MATHIAS. And in the language which is supposed to be repealed there are some exemptions. For example, there is subsection 207(i) which exempts "appearances or communications by a former employee concerning matters of a personal and individual nature, such as personal income taxes or other benefits."

In other words, you cannot write back to your former agency and say where is my tax record, where is my withholding record.

Mr. GARRETT. Well, again, Senator, I got the bill late last night, but as I recall it, if in fact you are repealing 207(c), which is the 1 year bar, to which the exemption applies, in fact they can not only communicate with their former agency on their own personal problems, such as income tax, retirement checks, or whatever, but they are just not barred from going back and representing a domestic agency, for example, or a domestic entity in that 1-year period, which they are presently barred from doing.

Senator MATHIAS. In the State Department's statement, you make a good point, that a former official a year after he retires could lobby Congress on behalf of an American manufacturer on a trade issue, even if he had been intimately personally involved in that trade issue, but he would be prohibited for 2 years from contacting the Department of Labor on behalf of a General Motors subsidiary in Canada, for example.

Mr. GARRETT. That is correct.

Mr. KOZAK. Yes, Mr. Chairman, these are the kinds of results that the proposed amendments would create that trouble us. I think our experience with the existing law has been good. You

never can be sure whether you are catching all abuses or whether everybody in the Department is paying attention to it.

I think what we can say is that certainly our ethics section is contacted very frequently by people who are about to leave Government and who seriously pursue what it is that they may or may not engage in during their first period of postgovernment employment, and I think the provisions of the existing law have had a salutary effect in that respect.

What is being proposed, though, would produce these kinds of rather absurd results that would, in our view, not assist enforcement.

Senator MATHIAS. And to give you one hypothetical example—not so hypothetical at that—you recall that former Attorney General Griffin Bell was retained by E.J. Hutton to look into their check kiting, but there have been other examples of foreign corporations, Hitachi, for example, was concerned about access to trade secrets, and if they had employed Griffin Bell, that would have been a criminal act for him to accept that employment, would it not?

Mr. KOZAK. It would appear to be under this bill, sir. I would note in that respect that the definition of foreign entity would seem to include wholly owned subsidiaries of American corporations. So you could have the situation of somebody who went to work for an American multinational who was asked to look into the business operations of one of their subsidiaries in a foreign country and he would be engaging in a crime by doing that.

Senator MATHIAS. Senator Biden.

Senator BIDEN. Gentlemen and ladies, I have reservations about this bill, which I have expressed to the chairman, and I have proposed a series of amendments because I think it is too broad.

But I am getting a little confused here as I listen to you. And although my colleague from Maryland never confuses me, only enlightens me, I think he is drawing this case in the extreme, which all good lawyers attempt to do. Let me try and be a good lawyer for a moment and make sure I have got this focused, if I can.

I hope we all understand why we are even here. There is a concern on the part of the public that we—I use that in the generic sense—all of us who work for the Government are a little bit less than as honorable as we should be.

I need not tell the Defense Department what public opinion is about the ethics of the Defense Department, whether or not it is true. I happen to believe it is vastly exaggerated, but there is a clear public perception.

So we are dealing with an issue that democracies always have to deal with, confidence in the Government, and confidence in the Government, I hope we would all acknowledge, is somewhat shaken when people read about things like, whether it is legal or illegal, Mr. Deaver posing in his limousine on the front page of Time magazine—or whatever magazine it was. So that is why we are here, to deal with that question.

At the same time, no one is here to go out to try to nail Government employees and former Government employees. It seems to me there are two big issues that should be raised by those of us who are concerned about the broad sweep of the legislation. One is its

constitutionality. Does it exceed the constitutional limits to which a United States Congress can go in passing legislation? I think there are some concerns about that. I think there are some real concerns about that, and I have raised them and I will continue to raise them.

Second, would it somehow impede the efficient functioning of the Government of the United States of America? Would it be as bad as both of you imply, that all these good people will not come and work for their Government because this will be so restrictive, not constitutionally, but restrictive practically on their ability to earn a living?

And this takes me to the point just raised by the Senator from Maryland and by the statement of the State Department about this bizarre situation that someone will be able, in 1 year, to lobby the State Department on behalf of a domestic company but not be able to lobby the Labor Department for 2 years on behalf of a foreign company. My question to you is, "So what?" So what? Are you telling me that that is a constitutional inconsistency or are you telling me that that is going to keep someone, that kind of law, from coming into Government service in the first place?

If it is either of the two, then I accede to it. If it is not, then it seems to me it is something that does in fact positively impact upon the public's perception of whether or not their Government employees are public servants. And so I would sort of like to start to distinguish these things.

The fact that you can show me an inconsistency does not mean much to me unless you can tie it to the efficient functioning of Government, recruitment, and/or a constitutional prohibition, because there are other reasons.

Does anyone doubt, does anyone in this room doubt, that the public does not like former Government employees representing foreign companies? Let us forget all about the legalities. Does anybody doubt that the public thinks there is something wrong with that? I mean just like they probably think there is something wrong with the fifth amendment, too, in terms of, you know, self-incrimination.

But does anyone doubt—I am serious—does anyone doubt that the public does not like that? Does anyone doubt that, if a former Secretary of State tomorrow—thank God, we have had Secretaries of State who have some class—does anyone doubt, though, that if a former Secretary of State a year or 2 years or 3 years after his or her employment represented Japan, the country of Japan, in negotiations with the United States, that that would not offend the sensibilities of the American people?

So I would kind of like to put this in focus. What is so bad about the proposition—and take the example that you cite—what would be so bad about not being able to go to the Labor Department to represent Honda or whoever you cited for 2 years and yet being able to go back to the State Department after a year and represent the du Pont Company, or whatever the example was?

End of my little soliloquy.

Mr. KOZAK. There are a lot of points there, Senator. I guess I would say that there is a problem in terms of our ability to recruit,

and I can speak from the standpoint of having to manage a recruitment effort in a Government law office.

I do not doubt the public perception at all, but I can say that, despite the fact that we agree that the current starting salaries for attorneys in private firms here in town are outrageous. The fact is that we have to compete against them. We are already offering young attorneys coming out of law school one-third of what they can get working for a big firm.

You add to that the idea that once they leave, they are not going to be able to get a job filing petitions with the SEC or something like that, that has nothing to do with the State Department or foreign affairs work that they engaged in, simply because they are employed by the Government.

I guess what——

Senator BIDEN. Is that real? I mean I find that hard to believe. I find it hard to believe that that is something that would work in the real world. I mean I cannot imagine somebody, for example, leaving the State Department with a good record, being hired by a Wall Street firm and him saying, "By the way, you know I can't file petitions with the SEC," and them saying, "Well, by the way, we're not going to hire you." I mean what are we talking about?

Mr. KOZAK. Or any other Government agency. I think it is a constraint on somebody's ability to function as an attorney or a financial consultant or whatever their profession might be if they are cut off from contact with Government agencies.

Mr. GARRETT. May I insert something, Senator?

Senator BIDEN. Certainly.

Mr. GARRETT. I think the example that we were discussing is just one of many, and this is something that we found hard to believe, too, in 1979 when we were working on the regulations to implement the post-employment prohibitions in 207. And as we continued to pull that string, I mean it was unending. You just got, as you dealt with the SEC, you dealt with the Department of Energy and the Department of Defense and the agencies across the Government. I mean it was just an avalanche of examples as to how do we handle this problem.

Let me give you an example which you may find also hard to believe. Let us take that young attorney who leaves the SEC and goes to a Wall Street law firm or a Washington law firm and then the law firm sets about to build a Chinese wall around him to protect the firm from being disqualified from representing clients that may have matters pending before the SEC that he was dealing with, and the next thing the firm knows is when they walk into court the opposing side files a motion to disqualify the entire firm because they hired Larry Garrett who came from the SEC, and then they are engaged in 18 months of litigation on a collateral issue, and that happens.

Senator MATHIAS. Under this bill, that even could happen with law clerks from the Supreme Court, for example.

Mr. GARRETT. Well, that is the problem with the bill, Senator, as I look at it quickly. I cannot tell you all of the problems that may grow out of a very, very careful analysis of all of the provisions of the bill as they relate to all of the agencies, of all the employees who work across the Government, and that was the problem we

faced in 1978 and people threatened to leave, some people did leave, and in fact—

Senator BIDEN. Does the 1978 law work?

Mr. GARRETT. I think the 1978 law works. I think it works very well. It may not address specifically the question of lobbying per se, because the 1978 law is tied specifically to what you may have done or what I may have done in government or those matters that I may have had official responsibility for.

Now, if I did not, I leave government and 2 years after I leave government you come to me as a representative of a multinational corporation and say, "Mr. Garrett, we would like you to represent us on this issue," I had nothing to do with that issue, as a matter of fact it arose 18 months after I left. Under the present law, I can engage or you can engage me as an attorney to represent you. Under this bill you could not, in my opinion.

I think the current law does work, Senator, and that was the point I was trying to make.

Senator BIDEN. So that your major concern—do you have any concern—about tightening up the provisions of law that relate to the conduct of a former government employee dealing specifically with an agency and/or issues which he or she had responsibility for or access to information about while they were in the employ of the Government?

Mr. GARRETT. No, sir, I do not. I think the current law addresses those concerns, and it was the product of a long, hard debate in the Congress over a long period of time to fashion those and, as I pointed out, even though that occurred, even before the law became effective, the Congress had to turn around, because of its concern about the exodus and the prevention of people coming in, and amend the law before it became effective. Between January of 1979 and July 1, 1979, when it became effective, the Congress amended it because specifically the language in there, that is in this bill, about what does it mean that one should advise or can advise. That was a specific problem, and the people in the Government interpreted that to mean, "I can't go to work if I can't advise my senior partner or if I can't advise the accountant who is handling the firm on procedures in the Government, then I can't work." And they were at least threatening to leave before the bill became effective.

Senator BIDEN. Do either of you—did you have something to say? I am sorry, I thought you started to say something earlier.

Mr. KOZAK. No.

Senator BIDEN. Does either State or Defense have any comment or notion about the prospect of preemployment contracts to deal with this concern? Could you talk a little bit about that, because obviously that has been considered before?

Mr. GARRETT. You mean preemployment contracts of the Government employee coming in?

Senator BIDEN. Government employee. You are about to hire someone. You have a preemployment contract. Under the terms and conditions of the contract, you are not able to do a series of things based upon—let me back up.

My concern about the law is (a) it is much too broad, I think so, because there is not a nexus between what I did and what I am prohibited from doing. What we are trying to do is prevent people

who are taking unfair advantage of information they otherwise would not have had to use for the benefit of others—and, by the way, I think we are asking a lot of employees to make a distinction between whether or not—for example, if you have someone who is involved in strategy relating to trade negotiations and a year later is hired by someone else, he or she can say, “Well, I never shared that information,” but how could that not be factored into the decision as to whether or not they advised the client?

What I am concerned about is (a) that the breadth of the legislation is excessive; and (b) that we are focusing on the vast majority of former employees instead of the portion of the Government employees that really are of very great concern. So one of the things that I have been discussing with staff is the prospect of moving the legislation in the direction of dealing especially in areas where there has been classified information, access to classified information, top government employees, preemployment contracts like you have, by the way, in businesses.

You know, you go to work for one company, you sign a preemployment contract because you are going to have access to significant information that would be of great value to a competitor, and courts have held them binding. Have you all ever discussed that notion and, if you have, would you share your thoughts with me?

Mr. KOZAK. Senator, the department has a separation agreement that is signed with our employees when they leave wherein they undertake not to disclose to anyone any confidential information that they have received. This is in addition to the statutes that make it a crime to transmit national defense or cryptographic information to foreign governments and so on, and covers the entire range of information, including inside information they may have received.

In addition, based on the *Snepp* case, we have a new nondisclosure agreement that employees sign upon coming on board with the Department, so we have tightened up in that respect. I think this is an area where the focus is exactly right—disclosure of confidential information—and this is something that, as you may be aware, is of tremendous concern to the Department and the Secretary of State personally. The Justice Department has been engaged in prosecutions of people who are engaged in espionage.

We have recently, and I think the Department of Defense, as well, dismissed employees who have been engaged in unauthorized leaks. This is where the focus should be: The unauthorized disclosure of Government information should be dealt with, regardless of whether it is a former employee doing it, a current employee, or someone who has not been employed by the government at all. Whatever their motivation, whether it is ideological, idealistic, whether a paid professional spy, the result is the same. When you have people disgorging information of this kind, it does undercut our negotiating strategies with other countries, it undercuts our ability to implement policy within the country, and so this is a very constructive direction.

Senator MATHIAS. I could say to the Senator from Delaware that Mr. Civiletti and Mr. Cutler, who are about to testify, have seen this from both sides of the table and will be helpful in addressing his concerned.

Senator BIDEN. Well, as you observe, Senator, I am not taking a lot of time, I will not take any more except to say one last thing to this panel. You know, as I said, I share your concern and it is a shame. It seems to me that so much of this work and effort on our part and yours and other Government employees would be unnecessary in this regard if people just had a little more class in the way in which they conducted themselves. We do not need more law. If we just had people who had, as my dear mother would say, certain sensibilities, who understand that there are certain things that you just do not do.

The notion that we conduct ourselves the way we do after we leave this body—and, by the way, I will just say it very bluntly, including former Senators and former Congressman—I do not know how people can do some of the things they do even though they are legal. I do not know how they can bring themselves to do them. I do not know why an alarm does not go off in their head and say "this isn't right, this may be legal but it is not ethical."

I do not know how you legislate that, but I know one thing, it makes me angry. I appreciate your testimony and I am anxious to see the Defense Department's response to a closer scrutiny of the bill and maybe we can somehow change the attitude around here a little bit just by raising the questions.

Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Have you questioned?

Senator MATHIAS. Yes.

The CHAIRMAN. Mr. Kozak, what State Department regulation, if any, would prevent a former employee from accepting employment with a foreign government and relaying sensitive information, if not directly but by general recommendations to a foreign government that could be detrimental to this Nation?

Mr. KOZAK. Senator, with respect to sensitive classified information, there are the various espionage statutes that preclude the disclosure of information that would affect national defense and national security, information relating to cryptographic systems or other intelligence information.

In addition to that, the Department has a system requiring our employees when they come on board to sign a nondisclosure agreement to cover all forms of classified information, and likewise upon leaving the Department they sign a separation agreement where again they undertake not to disclose to anyone, whether a foreign government or any other party, any confidential information that they have learned as a result of their employment.

The CHAIRMAN. What recommendations other than a ban on employment can you suggest that would effectively prohibit such abuse?

Mr. KOZAK. Well, sir, I would say that effective enforcement of the existing law is a good place to start, and I think this is something that I know Secretary Shultz is very much concerned about at this time. We have had the rash of cases of professional espionage agents that the Justice Department is now prosecuting, and recently we dismissed a current employee for an unauthorized disclosure of information.

But the concern relates both to current and former employees, it is the disclosure of the information, rather than who did it and

who they gave it to that is the concern, because the damage is the same to the national interest in either case.

The CHAIRMAN. Mr. Garrett, do you agree that many former high-level military officers have knowledge concerning sensitive matters and if conveyed to others could be detrimental to this Nation?

Mr. GARRETT. I would agree that those who carry the normal clearances, most highly ranked military officers, would possess such information, sir.

The CHAIRMAN. Is there any way to effectively prevent former high-level officers from conveying this information to a foreign country without imposing any ban on employment for some reasonable period of time?

Mr. GARRETT. Well, as I pointed out earlier in my testimony, Mr. Chairman, there is a prohibition against military officers who have retired from being employed by foreign governments or foreign entities that arises out of the Constitution. There is a provision, however—the Congress has provided the machinery—whereby these individuals may, with the consent of Congress, and specifically the machinery is the permission of the service Secretary and the Secretary of State, that they can be employed.

I would have to state, as did Mr. Kozak, that the existing statutes on the manner in which classified information is handled that would be in their possession, the prohibition against its being delivered or imparted to those not authorized to see it would cover that kind of situation.

[Prepared statement and letter follows.]

STATEMENT OF
H. LAWRENCE GARRETT, III
GENERAL COUNSEL
DEPARTMENT OF DEFENSE

Mr. Chairman and Members of the Committee:

I appreciate the opportunity you have given me today to express the views of the Department of Defense regarding S. 2334, the proposed "Integrity in Post Employment Act of 1986."

The Department of Defense shares the concerns expressed by the other representatives of the Executive Branch. There is a fully developed body of law dealing with activities of officials and employees after they end their service with the Federal Government. It has been carefully crafted and refined over the years. It has been our experience that these laws adequately protect the interest of the U.S. Government and its taxpayers without intruding unduly upon the interests of those who serve it as civilians or military members.

Permit me to summarize the laws presently in force. Within the Executive Branch the various laws governing standards of conduct are supplemented by Executive Order 11222 (May 8, 1965) and regulations of the Office of Government Ethics (5 C.F.R. part 735). Within the Department of Defense we have implementing regulations (32 C.F.R. Part 40), and the DoD components have also issued implementing regulations.

The purpose of this regulatory program, as stated in the Executive Order, is "that employees avoid any action, whether or not specifically prohibited . . . which might result in, or create the appearance of --

- (1) using public office for private gain;
- (2) giving preferential treatment to any organization or person;
- (3) impeding government efficiency or economy;
- (4) losing complete independence or impartiality of action;
- (5) making a government decision outside official channels; or
- (6) affecting adversely the confidence of the public in the integrity of the government."

Three current statutes relate to employment activities after government service:

1. 18 U.S.C. § 207 places the following restrictions on departing officers and employees of DoD, including military personnel:

- Permanent bar. A former government employee may never serve as another person's representative in an appearance before the government on a case, contractual matter or other particular matter involving specific parties in which he or she participated "personally and substantially" while a government employee. The restriction also

applies to communicating with the government in a representative capacity.

- Two year bar. For a period of two years after leaving federal service, the individual may not serve as another person's representative in an appearance before the government or communicate as a representative on any particular matters involving a specific party or parties which were actually pending under the former employee's "official responsibility" in his or her last year of service. This two year bar is even broader with respect to designated "senior employees" who may not even assist in such representation by personal presence.

- Senior employee, one year bar. For one year after leaving federal service, senior employees may not represent anyone other than the United States before their former agency on any particular matter pending before or of substantial interest to the agency.

2. 37 U.S.C. § 801(b) prohibits retired regular military officers from selling, or negotiating to sell, supplies or war materials to the Defense Department and related agencies for a period of three years after retirement.

3. 18 U.S.C. § 281 prohibits retired regular military officers permanently from selling to their own former military departments.

Under legislation recently passed by the Congress (P.L. 99-145), personnel of this Department became subject to new restrictions and to vastly expanded reporting requirements. A full array of administrative penalties and enforcement authority also are provided.

1. Section 921 of that criminal statute applies to anyone who was a "Presidential appointee in Federal employment." If such a person was a principal negotiator in a contract, or in the settlement of a contract, he or she may not go to work for such contractor for a period of two years.

2. Section 922 (10 U.S.C §2397) is a major expansion of an existing reporting system. It requires persons coming into the Department from industry, and departing personnel going to major contractors, to file detailed reports of their activities and the relationship between their government and nongovernment work.

3. Section 923 (10 U.S.C. §2397a) establishes a new reporting system for persons engaging in employment negotiations prior to their departure from DoD service. This system insures that supervisors and ethics officials are made aware of pending job negotiations and are able to work with persons preparing to depart to avoid any real or apparent conflict of interest.

There are several closely related legislative proposals under consideration before this Committee. I understand that the versions I have been given may not be the most current. Thus, with your permission, Mr. Chairman, I propose to supplement this statement with a more detailed analysis of the several bills as they develop and limit myself at this time to a brief summary of the principal concerns of the Department of Defense and ask that the Committee not take any action on the bill until the Department provides its analysis.

Before considering limitations on the employment of former government officials by foreign governments, it may be useful to note the effect of a provision of the U.S. Constitution. Article I, section 9, clause 8 of the Constitution prohibits any person holding any office of profit or trust under the federal

government from accepting any office or title of any kind from a foreign official or foreign state without the consent of Congress. All retired military personnel, both officer and enlisted, Regular and Reserve, are covered by this provision, according to the Comptroller General.

The Congress has established machinery for providing review of the applications of retired military members for such foreign employment and the granting of approval in appropriate cases. This is accomplished by the Secretary of the applicant's military department and the Secretary of State after consideration of the relevant facts. In addition to this limitation, retired military members are subject to all of the restrictions on foreign representational activities applicable to former civilian officials of the government, including the Foreign Agents Registration Act of 1938.

The enactment of new law, in haste, may be counterproductive. The existing body of laws has developed over a long period of time and addresses the misconduct most citizens find inappropriate. Before enacting substantial changes in ethical standards governing former officials it would be prudent to allow existing law to be applied to the cases currently in the public eye. After all of the facts have been put on the table and decisions made regarding possible violations, then the need for additional legislation may be weighed.

Increased restrictions on postgovernment employment, will, in my opinion, greatly hamper the recruitment of qualified persons for DoD service. In addition, there is the real potential for a mass exodus of experienced personnel. I don't believe that the proposed new restrictions would improve the ethical climate, but instead would be construed as evidence that persons who serve the government are not considered to be honest citizens. Because of the anticipated adverse consequences of further post-employment restrictions without concomitant benefits, I urge that no further action be taken at this time. The Department of Defense needs highly experienced and well qualified persons to manage its very complex programs. Anything that makes government service less attractive exacerbates these management burdens.

In conclusion, I want to emphasize that it is our desire in the Department of Defense to support the highest standards of conduct and integrity. Although we are most reluctant to see any changes in present laws in this area, we are prepared to work with the members of your staff, if desired, and with the other agencies of the Executive Branch to consider improvements. It is imperative that any changes to existing law be carefully considered to avoid prompting an exodus of talented officials or a barrier to future service from those not presently in the government. The enactment of S. 2334, and the proposed amendments I have seen, raise the very real prospect that this Department will be denied talent it desperately needs.

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DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D.C. 20301-1600

27 JUN 1986

Honorable Strom Thurmond
Chairman, Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I appreciate the opportunity to supplement my testimony given on Wednesday, June 18, 1986, before the Judiciary Committee on the issue of whether proposed Senate Bill S.2334 further restricting post-employment activities of former government officers and employees is needed. As I stated before the Committee, we have serious reservations concerning many provisions of this proposal and we believe the current criminal statutory provisions of federal law, principally incorporated within 18 U.S.C. §207, adequately address abuses intended to be corrected by S.2334.

We concur with positions taken by the representatives of the Department of Justice and the Department of State that, as currently drafted, S.2334 would repeal several valuable provisions of the United States Code that prevent conditions which would be detrimental to the interests of the United States Government. Prominent among these is the deletion of Section 207(b) of Title 18, which prohibits for a two-year period a former employee acting on another's behalf, with or without compensation, in any matter that was under his official responsibility for one year prior to leaving government service, or aiding or assisting in the representation in any matter in which he was personally and substantially involved while in government service. We believe that the appearance of the misuse of "inside information" and influence peddling is indeed damaging to public confidence in our government, and is, if at all, most likely to occur without the threat of criminal prosecution which now exists. Furthermore, the proposed legislation prohibiting the oral or written communication with government officials would not match the more comprehensive coverage of the current law that prohibits the aiding, counseling, advising, consulting, or assisting in representing another before departments and agencies.

Senate Bill S.2334 also would significantly alter the effect of Section 207(b) which now prohibits all employees from appearing before or communicating with their agency where the matter was previously pending before the agency, or in which the individual was personally and substantially involved. We believe this restriction bears a direct relationship to the proper and ethical conduct of government business, should apply across the board to everyone, and should, as it is currently written, remain a strict prohibition for a period of two years. The proposed legislation would reduce the covered period to one year; would not apply unless the former employee is somehow compensated for his efforts, and would restrict the prohibition to those former employees who had served at or above the GS-15 level. (Paragraph (b)(1)(A)). A further clause would lower the coverage to GS-11, but only apply to the particular department previously employing the individual. (Paragraph (b)(2)). This weakening of the law could have a detrimental effect upon the operation of this Department. Predictably, should a change be enacted, inappropriate contacts could occur after the one year period by any employee over the pay grade of GS-11, as well as by individuals having motives other than direct remuneration.

The other area of real concern to us is the effect such a change would have on Section 207(c). That section was intended to prevent former senior executives from influencing government officials on behalf of anyone on matters pending before their former agency, or in which their former agency has an interest, for a period of one year. The proposed legislation would require that a former covered employee receive some form of compensation for such activity to be provided. (Paragraph (b)(1)(A)). As already stated, we must be sensitive to this type of conduct, even in cases where no financial benefit flows to the individual.

The scope of the proposed legislation is of equal concern to us. As now written, the proposal will personally reach and affect thousands of dedicated and loyal employees serving the federal government. This is not to say that restrictions on post-employment activities are not appropriate; however, such restrictions must be reasonably applied, either effectively correct or prevent a real abuse, have a nexus to the problem, and not be so overly broad so as to restrict the individual well beyond the area of concern. Former employees are, after all, citizens. They should not be unreasonably penalized for having served their country by government service, and that is equally true for senior members of business and industry entering public service.

It is exactly the overbroad nature of the proposal and the lack of a nexus with the perceived problem that most disturbs us. The sweeping nature of the restrictions forbidding communications with anyone in government and on any subject bears little relationship with specific duties and responsibilities for which a potential for abuse of influence may exist.

In a like manner, the "shotgun approach" of restricting associations by broadly defining "foreign entity" goes beyond what is appropriate to curb the most recently perceived abuses. (Paragraphs (b)(3) and (i)). At a time when many corporations are involved in multinational business, employment with these firms might become extremely difficult during the various time periods stipulated in the bill. Employment by a firm located or incorporated in a foreign country, even a close ally, would be out of the question. Unresolved is the issue of whether a subsidiary of a foreign corporation, such as Volkswagen of America, is a "foreign entity", even though incorporated in the United States and having its principal place of business here. Presumably, such a corporation could be viewed to be "controlled" by the parent corporation. It also would appear that a former DoD employee could not work for an American company in the United States if foreign owned. The same would hold true for a former employee attempting to gain employment with a US subsidiary doing business in a foreign jurisdiction and thus incorporated in that foreign jurisdiction. Association with a "foreign entity" as defined by the amendment is far too sweeping.

If the restrictions are judged to be unreasonable, there very well may be some constitutional issues involved in such broadly written legislation, particularly concerning the restrictions on employment by a foreign entity. The opportunity to pursue a profession or employment is a fundamental right unless good reason exists for a governmental restriction. The right to work for a living has been well recognized as a basic right provided by the fifth amendment. (*Trullax v. Raich*, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed.131 (1915); *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 27 L.Ed.2d 910 (1973)). We believe such an issue is raised by the examples we have provided and that equal protection questions may prevent enforcement should this bill be enacted.

We reject the argument that the average worker need not worry about "technical" violations of a federal criminal statute since no one is interested in those cases. A criminal law that affects what would otherwise be an innocent act as well as one that is corrupt is a bad law, and this proposal would seem to do just that. For example, under its provisions, a former DoD

employee above the pay grade of GS-15 could not within one year of termination of employment protest an adverse IRS income tax ruling. (Paragraph (b)(1)). Many individuals in the Legislative Branch could not even complain to their Congressman. (Paragraph (b)(2)(C)). A retired military officer would be committing a criminal offense by becoming an official with the International Olympic Committee within two years of separation or retirement from service if the Olympic Committee were viewed as a "foreign entity". (Paragraph (c)(2)). In addition, this prohibition would apply for ten years for certain individuals. (Paragraphs (c)(2) and (c)(2)(B)(i)). Likewise, a covered former or retired DoD employee could not manage an apartment house if that structure were owned by a foreign national who resided overseas. (Paragraph (c)(2)(A)).

What relationship does the private and personal tax appeal by an individual have to the protection of a valid government interest and the preservation of public confidence in the government? We submit no such relationship exists. What purpose is served by preventing individuals from seeking honest and above-board associations and employment? We submit no legitimate purpose is thus served. These restrictions might even directly affect the agency, since it might be difficult to communicate with a recently separated employee, even on matters concerning his past employment with DoD, if his reply back to the department could be construed as an attempt to influence the agency.

There are other problems with the proposal as presently written. The restriction on the communication with special government employees is included paragraph (b)(1). Yet it is unclear whether this prohibition applies during the period of time when the special government employee is not acting in that capacity. This is a particular problem with employees who spend the majority of their time working in industry or business and not directly for the federal government.

Besides being concerned with a proposal that appears to reach situations that could not possibly involve a conflict of interest situation, an important interest of our department remains whether these restrictions on post-employment opportunities will prevent the agency from retaining or recruiting employees. We think it will. Certainly, those close to a decision on leaving service might be persuaded to do so by further restrictions which could take effect in the near future. Others presently planning a career in government service may very well decide that the price is too high to pay. In addition, those impacted by the longer period of restriction, up to ten years in some cases for high ranking employees, (paragraph (c)(1)(A)), are in turn probably faced with a shorter remaining working life. For an individual who is, for instance, 55-years-old, a ten-year restriction might mean the balance of his working life.

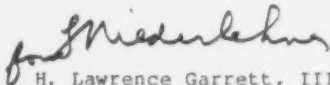
Retaining senior special government employees is a particular problem. There is a question whether special government employees are included in the definition of "former officer or employee of the federal government." (Paragraph (b)(3)). They were specifically included in the present law, but the proposal only states that the meaning includes former employees of the three branches. If they are included, we may experience an even harder time recruiting and retaining some of these people, especially the senior level special employees working with the department as industrial consultants, scientists, and engineers on a part time basis.

Not only will this proposal, in our opinion, affect the operation of the department, but, as has been stated in testimony before your Committee, there already exists a body of law apart from the present Section 207 that deals with these issues. Within the Department of Defense we have several regulations supplementing Executive Order 11222 (May 8, 1965), which include restrictions listed in 32 C.F.R. Part 40. The DoD components

also have regulations implementing the various conflict of interest laws. These regulations relate to 18 U.S.C. §207; 37 U.S.C. §801(b), which prohibits retired regular military officers from selling, or negotiating to sell, supplies or war materials to the Defense Department; and 18 U.S.C. §281 which prohibits retired regular officers from selling to their former military departments. Under more recent legislation (P.L. 99-145) new restrictions and reporting requirements have been imposed on Presidential appointees, as well as lower ranking personnel, regarding post-government employment with contractors.

In conclusion, we believe that the current provisions of the law, as implemented by regulation, are sufficient to deal with the abuses perceived by the Committee. Furthermore, the subject proposal appears obviously overbroad in its application of unreasonable restrictions on innocent relationships and associations created after service with the department has ended. In our opinion, although hard to calculate statistically, the proposed legislation will have a detrimental effect on our attempts to recruit and retain the very best people for public service. As stated before your Committee, we are prepared to work with the members of your staff and other Executive branch agencies to consider improvements in standards of conduct. However, we do not believe that S.2334 as presently written contributes positively to solving the problem.

Sincerely,



H. Lawrence Garrett, III

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Mr. Chairman, I support the efforts of these hearings and the bill, S. 2334, that is before us and I ask unanimous consent that my statement may appear at the opening of the hearings in the appropriate place.

The CHAIRMAN. Without objection, it is so ordered.

Senator DECONCINI. I have no questions. Thank you.

The CHAIRMAN. If my opening statement has not been placed in, I would ask unanimous consent that that be placed at the beginning of the hearing.

Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman I do have a prepared statement which I also will submit for the record.

The CHAIRMAN. Do you have any questions?

Senator LEAHY. No.

The CHAIRMAN. Senator Mathias, do you have any further questions?

Senator MATHIAS. No.

The CHAIRMAN. There is one question I would like to ask both of you. As I understand, you feel the law is now sufficient?

Mr. GARRETT. I feel that the body of laws to control post-Government employment problems is sufficient, yes, sir.

Mr. KOZAK. I would agree with that, sir.

The CHAIRMAN. If it is sufficient, how do you account for the abuses that you see now?

Mr. GARRETT. That is a very difficult question.

The CHAIRMAN. Is it failure to enforce the law or is there a vacuum in the law?

Mr. GARRETT. I think it is probably more the former—and I am speaking basically, Mr. Chairman, from my knowledge of what I read in the newspapers—we have the laws. We cannot, of course, as Senator Biden said, legislate ethics any better than we can any other conduct that we find unacceptable.

But I do think that when these abuses, and they probably will continue to occur as long as we are dealing with human beings, as they come to light, the laws are there and sufficient if they are enforced, strongly enforced. I think they are there.

As was pointed out by Mr. Trott, not only do we have criminal sanctions for postemployment violations by former Government employees, but there are administrative provisions that can also be brought to bear where, for example, a U.S. attorney in Kansas or in San Diego or wherever chooses for reasons known only to him, either evidentiary reasons or others, that he is not going to proceed with the case. The burden of proof is less and the agency has the ability to enforce the prohibition that may have been violated.

The CHAIRMAN. It is hard to make people understand with the abuses that have been taking place. We do not have a law to punish it. If we do have a law to punish it, why has it not been done?

Mr. KOZAK. Senator, I would avoid commenting on any particular case that is now under consideration, but I think I am not convinced, with respect to the matters that are causing concern, that we should reach a conclusion that the law has not worked until we see what the outcome of the process is.

If, once these matters are dealt with and it appears that there is some loophole in the law that is allowing conduct that should not occur, to occur, then we have something to deal with, something concrete, and we can come back and look at that and plug the loop-hole. But I think our concern is not to get too far ahead of the situation and to conclude too soon that the law has not worked.

Mr. GARRETT. I would concur in that, Mr. Chairman.

The CHAIRMAN. Thank you, gentlemen, for your appearance.

Mr. GARRETT. Thank you, sir.

Mr. KOZAK. Thank you, sir.

The CHAIRMAN. Our next witness is the Honorable John F. Banzhaf, professor, George Washington University School of Law.

Professor Banzhaf, if you will come around, please. Professor Banzhaf, can you take 5 minutes and give us the thrust of your statement and then the rest of your statement can go in the record.

**STATEMENT OF JOHN F. BANZHAF III, PROFESSOR OF LAW,
GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW**

Mr. BANZHAF. I will try to be brief, Mr. Chairman. As you know, I was asked by the staff of the committee to come in and testify on the constitutionality, not the wisdom or the advisability, but the constitutionality of prohibiting former high-level Government employees from being employed by foreign entities. Perhaps this is because my teaching involves constitutional law, perhaps because as a public interest lawyer I have been involved in quite a number of cases involving constitutional law making new constitutional principles, maybe it is because I am one of a few professors foolish enough to remain around Washington during the hot weather.

In any event, based upon what I have seen, my conclusion is there are no serious constitutional problems in this undertaking, and here I disagree strongly with the position of the ACLU, with whom I usually agree.

They suggest in their testimony on pages 1 and 2 that the bill would restrict freedom of speech and that as such it has to meet some very, very strict standards. They state at the top of page 2 the fact that the bill restricts only making that speech for a fee does not in any way change the result.

Mr. Chairman, there is a case, as we lawyers say, which is directly on point. The matter has been decided, and it goes the other way. The case arose out of the Congress' bill to ban cigarette advertising on radio and television. In that situation, had the tobacco industry challenged that ban, they of course could have raised the issue of first amendment, freedom of speech, and they would have raised presumably the question of whether or not commercial speech is entitled to as much protection as noncommercial speech. But they did not raise it. The only people who challenged it were the broadcasters. They said their freedom of speech was impinged.

A three-judge court ruled to the contrary. The case was affirmed by the U.S. Supreme Court and, as I set out on pages 5 and 6 of my testimony, they say very clearly that there was no infringement on their speech, they are free to say anything they want. The only thing they are prevented from doing is collecting a fee for it.

A more common example would be this: Senator, you or I or any person in this room is free to go out on the streets and to tell people what we think the law means or how to deal with some physical ailments or how to deal with a spouse. That is protected by the free speech clause.

The moment we begin charging for it, we run into the criminal law prohibiting the dispensing of legal advice, medical advice, and in many States marriage advice. So there is an important distinction, and as long as you have that requirement that it must be for a fee or remuneration, I do not believe that speech is being directly impeded, therefore all the other things that follow from it do not apply.

Similarly, I have gone through equal protection. It seems to me there is more than a rational basis, and here once again I have to respectfully disagree with the ACLU. They say at the bottom of their testimony today at page 3 that there might be constitutional problem in restricting the activities of members of the legislative and judicial branch, although we do with the executive branch. They say Congress can act only in those areas where there is a record of abuse, and there is no record of abuse.

It seems to me quite frankly a ridiculous constitutional principle that Congress can act only after the damage has been done. I have no reason to believe that the legislative branch or the judicial branch would be any less honest or have less character than those in the executive branch.

In any event, in my testimony I have run through the usual constitutional arguments, freedom of association, freedom to petition the Government, equal protection, right of employment, due process, bill of attainder, ex post facto, and so on, and I find no major constitutional problems.

I do make two suggestions which I think will make any bill which comes out of this committee more effective, regardless of what limits you may eventually adopt. The first would be, as Senator Mathias alluded to earlier, including a civil forfeiture provision. The advantage of this is that you get around the problems and the very high standards of proof involved in a criminal proceeding. Second, it would prevent the problems of undue enrichment of profiting from a crime, and here we only have to think back to the days of Spiro T. Agnew who took a plea but was allowed to keep the money until my law students sued him and got it all back.

The other would be to, in addition to a forfeiture provision, to provide for private actions to recover, as we do, for example, under the clitam statute or the water pollution statute, this helps get the information, it helps to detect the infraction, it deals with the situation where the prosecutor, for whatever reason, refuses to prosecute and I think deals with the situation that Senator Biden talked about before of people asking why is something not being done. If only the Government can bring the action and the Government does not, there may be various suspicions if that action can be brought by private individuals, as again under clitam or the pollution act, and if the actions are not brought I think people will believe then that the actions are not well-founded.

I thank you for your time.

[The prepared statement of Mr. Banzhaf follows:]



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TESTIMONY OF JOHN F. BANZHAF III, PROFESSOR OF LAW
THE NATIONAL LAW CENTER, GEORGE WASHINGTON UNIVERSITY

BEFORE THE
COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE
WEDNESDAY, JUNE 18, 1986

ON THE
CONSTITUTIONALITY OF PROHIBITING FORMER HIGH-LEVEL GOVERNMENT
OFFICIALS FROM LOBBYING ON BEHALF OF FOREIGN GOVERNMENTS:

S. 2334 - INTEGRITY IN POST-EMPLOYMENT ACT OF 1986

SUMMARY

As a law professor with considerable experience concerning constitutional issues asked to testify as an impartial witness, I conclude that it clearly would be constitutional for the government to prohibit former high-level government officials from accepting employment to represent foreign powers, and that those who raise constitutional issues appear to ignore two important points:

(1) that the government has far greater leeway in establishing conditions of employment than it does in imposing identical restrictions through its general police powers; and

(2) that the bill would not prohibit persons from speaking, associating, or from petitioning for redress of grievances, but only from seeking to do so for profit.

I would also suggest that:

(1) to prevent people from profiting from their wrongdoing, and to help avoid the difficult burdens a criminal prosecution often presents, the law contain civil forfeiture provisions like those in R.I.C.O., "Son of Sam," and similar laws; and

(2) to help insure that wrongdoing will not go undetected, and that wrongdoers will not escape legal action for political, budgetary, and other reasons, the law permit actions to be brought by private citizens, who would then receive a portion of any judgment, as do similar laws relating to governmental fraud, water pollution, etc.

My name is John Banzhaf, and I am a Professor of Law at the National Law Center of the George Washington University.

I have asked by the staff in the last several days to consider and then to testify as an impartial witness on the constitutionality of a bill which would prohibit former high-level officials from lobbying or attempting to influence governmental decisions on behalf of foreign governments; a prohibition which could last either for many years, or even for the remaining life of the former employee. For the reasons set

forth very briefly here, I believe that such a prohibition does not raise major constitutional problems.

I would also like to briefly suggest two simple additions, modeled on existing laws, which I believe would make the bill far stronger and much more effective. Specifically, these suggestions are to provide that any money earned in violation of this law be subject to forfeiture in a civil proceeding, and that such proceedings may be initiated -- and if necessary, prosecuted -- by private citizens, who would then be eligible to share in any monetary judgment.

MY QUALIFICATIONS AND BACKGROUND

Let me begin by briefly stating my qualifications and background. First, I have taught Administrative Law for over a decade; a course which deals with, and to a large extent is built upon, various constitutional principles. Second, as an activist public interest lawyer, I have been directly involved in a number of legal proceedings which raised major constitutional issues, and I am proud to say that in a number of these cases I helped to establish important principles of constitutional law.

For example:

(A) I successfully defended the constitutionality of a decision I had obtained from the Federal Communications Commission requiring stations under the "Fairness Doctrine" to make available millions of dollars in free broadcast time for anti-smoking messages, Banzhaf v. F.C.C., 405 F.2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969);

(B) invited to participate as amicus curiae, I helped to defend the constitutionality of the congressional statute banning cigarette commercials on radio and television, Capital Broadcasting Co. v. John M. Mitchell, 333 F. Supp. 582 (3-judge, D.D.C. 1971), aff'd, 405 U.S. 1000 (1972);

(C) a suit, brought under my supervision by students at the National Law Center, helped to establish constitutional "standing" in environmental actions, and is one of the leading cases on this constitutional issue, United States v. Students

Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973);

(D) in a recent proceeding, I convinced a federal judge it was constitutional for him to require the Attorney General to seek the appointment of an Independent Counsel to investigate "Debategate", Banzhaf v. Smith, 588 F. Supp. 1167 (1984), a determination later overturned but only on non-constitutional grounds, 737 F.2d 1167 (D.C. Cir. 1984);

(E) and in another recent case, invited again to participate as amicus curiae, I developed a new constitutional theory concerning restrictions on the advertising of dangerous products which the court cited with apparent approval, Dunagin v. City of Oxford, Miss., 718 F.2d 738 (5th Cir. en banc 1983).

In summary, as both a law professor and as a legal activist, I have had considerable theoretical as well as practical experience related to various constitutional law issues, and it is upon this basis that I testify.

INITIAL CONSIDERATIONS

Usually, in trying to determine whether a proposed law might violate the Constitution, it is appropriate to begin by considering what specific provisions of the Constitution might be offended. However, here it appears, at least from my brief reading of the April 29th hearing record, that the Deputy Assistant Attorney General, while often referring to constitutional problems or even "pitfalls," cited no cases nor even any specific portion of the Constitution. The closest he seems to have come is a vague reference at page 72 to a "right to associate . . . to speak out . . . to make a living . . ."

Thus, with all due respect, it seems to me that much of the discussion of what interests a court might seek to balance, and the result of any such balancing, is premature. Indeed, in considering the individual constitutional issues which might be implicated, I can find no significant problems.

FREEDOM OF SPEECH

It must be carefully noted that the proposed law would not prevent the former employee from speaking on any topic, or on behalf of any individual or entity. Instead, all that which would be restricted is his or her ability to do so for profit; an interest which by itself is not protected by the Constitution.

This very issue was raised in the case in which I successfully defended the constitutionality of the statute banning radio and television advertising of cigarettes. Here the broadcasters argued that their right of Free Speech was infringed because they could not be paid by cigarette manufacturers to speak on their behalf. The court held not only that the right was not infringed, but that there was no such right!:

In that regard it is dispositive that the Act has no substantial effect on the exercise of petitioners' First Amendment rights. Even assuming that loss of revenue from cigarette advertisements affects petitioners with sufficient First Amendment interest, petitioners, themselves, have lost no right to speak—they have only lost an ability to collect revenues from others for broadcasting their commercial messages. . . Finding nothing in the Act or its legislative history which precludes a broadcast licensee from airing its own point of view on any aspect of the cigarette smoking question, it is clear that petitioners' speech is not at issue. Thus, contrary to the assertions made by petitioners, Section 6 does not prohibit them from disseminating information about cigarettes, and, therefore, does not conflict with the exercise of their First Amendment rights. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 583, 584 (3-judge, D.C. Cir. 1971), affd, 405 U.S. 1000 (1972) [emphasis added]

Similarly, it would appear, former employees under this bill would not lose any First Amendment rights, since they would be free to express their own beliefs concerning even the issues of concern to a foreign country. The prohibition would apply only if they sought to profit from making such statements; an interest which is not constitutionally protected.

Similarly, any First Amendment rights foreign countries or foreign entities may have would not be impinged, because they would be free to employ any one or more of a very large number of lawyers, lobbyists, public relations specialists, spokespersons, and others both able and willing to plead their cause. Surely it cannot be argued that only former high-level government officials have the ability to effectively speak for foreign governments. Thus, short of a prohibition which is so broad that no effective

representative could be found by a foreign entity seeking to be heard, any rights they may have to Free Speech are not adversely affected.

This point, simple yet crucial to understanding the underlying constitutional issues, can perhaps also be illustrated by a simple analogy. The right to be represented by legal counsel is also of fundamental constitutional importance. Indeed, in criminal proceedings, a defendant is entitled to have counsel appointed if he cannot afford it himself. In civil proceedings, although the government cannot be forced to pay for his counsel, a party is nevertheless constitutionally entitled to be represented by one.

But no one would suggest that any individual attorney has a constitutional right to represent any client in the world, and that his privilege to represent a particular client cannot be negated by possible conflicts of interest or other factors. A law prohibiting any former US attorney from representing as a criminal defendant a person whose prosecution was initiated by his office would certainly not be unconstitutional, although it arguably involves elements of both Free Speech and Right to Counsel.

Likewise, an attorney's privilege to represent any and all clients may be taken away if he fails to meet certain standards, or if he even fails to pay his bar dues. The U.S. Supreme Court has held that an attorney's privilege to represent a client in a foreign jurisdiction can be denied even without a hearing, Leis v. Flynt, 99 S.Ct. 686 (1979).

From the point of view of the client, the analysis is similar. He has no right to be represented by a particular attorney, particularly where, for example, a particular attorney would be barred from representing a person because of a conflict of interest. Indeed, the prohibition may extend not only to an individual attorney, but in some cases to an entire law firm. Yet, assuming that not all counsel potentially competent and able to represent a person are barred from assisting him, the client's constitutional rights are likewise not infringed.

FREEDOM OF ASSOCIATION, AND TO PETITION THE GOVERNMENT

Similarly, and for exactly the same reasons, it would appear that the right of former officials to associate with those of their own choosing, and/or to "petition the government for a redress of grievances," is not adversely affected. Once again they may associate with whomever they wish, and make whatever pleas they wish to governmental officials or agencies, provided only that they do not seek to profit thereby.

It would also follow, for the reasons stated previously, that the foreign entities would not be impaired as to these rights since they are still free to persuade people to associate with them, and/or to file petitions on their behalf with the government. Again, short of a ban so broad that they would be denied any effective representation, no serious constitutional issues appear to be raised.

EQUAL PROTECTION

Obviously, the Equal Protection clause does not require that all persons be treated completely equally with no distinctions whatsoever. Generally all that it requires is that there be some "rational basis" for the distinction. Here it appears that the legislative history provides at least a rational basis for distinguishing between certain former high-level officials and other former government employees.

There are two exceptions to this rule; situations in which the courts will require more than a "rational basis" for upholding a distinction. The first is where the distinction directly affects people in a "suspect category"; i.e., those who have suffered a history of invidious discrimination, and lack political power to protect their interests. Obviously high-level government officials do not qualify for this added protection.

The other exception occurs where a fundamental interest or freedom is impaired as a result of the distinction. However, since here, as discussed above, freedom of speech, association, etc. themselves are not being impaired, it would also seem that all that the courts would require is a rational basis for the distinction

RIGHT TO EMPLOYMENT, AND DUE PROCESS CONSIDERATIONS

At page 72 of the transcript of the earlier hearing, the Deputy Assistant Attorney General refers to "his [the former official's] right to make a living." Yet no such right is protected, by itself, in the Constitution.

The 14th Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." In some cases an employee's expectation of continued employment in an existing position protected by a tenure-like system has been held to constitute a "property" interest. But at most this means that he cannot be discharged on the basis of specific individualized factual allegations without some kind of hearing at which these individualized facts can be determined; a principle which clearly has no application here.

Likewise, if the firing involves such a stigma that employment in one's chosen field is severely impaired, a "liberty" interest may be implicated. But again this means at most that before there can be such a stigmatizing finding, there must be some kind of hearing to determine the individualized facts. Here, since they would be no stigma and no individualized finding, no Due Process hearing would be required even if the prohibition was so broad as to effectively preclude employment in a chosen field. Since former high-level government officials will still remain free to represent a large number of different interests before the federal government, there would not even be a severe empairment of employment opportunities.

Finally, even if one attempts to analogize the instant situation to cases in which laws prohibit employment because of what courts term an "irrebuttable presumption," the U.S. Supreme Court has deferred to Congress with regard to foreign affairs, even in situations where an existing position must be terminated based upon requirements which may not have been in place when the employment began, see Vance v. Bradley, 440 U.S. 93 (1979) (upholding constitutionality of mandatory retirement age for foreign service officers). Here, since the bill would restrict only future employment and not an existing position, and since it would be applied only to persons who continued their employment

knowing of the consequences, constitutional arguments are even weaker.

BILL OF ATTAINDER OR EX POST FACTO LAWS

Congress may easily avoid any argument that the proposed law would amount to a bill of attainder, or an ex post facto law, by being careful to see that its prohibitions would apply only to persons who accepted or continued in employment for a reasonable period after notice that such continued employment would preclude certain potentially profitable activities in the future. In that way the adverse consequences would occur only to those who knowingly and willingly accepted them.

With regard to Members of Congress, or the President and Vice President, it might be prudent to have the prohibition apply only to those who began a new term of office after the effective date of the act. Unlike appointed officials who are free to leave an office they are already in if they do not wish to have their future activities restricted, persons elected to an office have at least some moral obligation to continue in the office for its full term, and the persons who voted for them have interests -- which may rise to a constitutional level -- not to have them forced out of office by newly adopted conditions.

Under this analysis it should be noted that the government is exercising not its general police power to regulate the conduct of citizens generally, but rather a power it enjoys at least as much as private employers to place conditions upon those who choose to work for it. In this regard its power is far greater, and constitutional restrictions much weaker, than with regard to non-governmental employees. Cases upholding the Hatch Act -- even though there, unlike here, Freedom of Speech and political association were directly impaired -- are familiar examples of this principle.

It apparently was in this regard that the Justice Department suggested that the courts were likely to attempt to balance the government's interests against those of the employee, and to prohibit restrictions which lasted longer than might be warranted by such a balancing. But, while this type of analysis

is routinely used with regard to restrictions in contracts concerning private employment, the justification for its use here seems dubious.

An employment contract with a private firm which attempts to prevent an employee from working in certain lines of endeavor, or with certain competing employers, for excessive periods of time may be struck down. But it appears that this is only true because of certain important principles not applicable here. Thus courts will frequently refuse to enforce such restrictions in large part because they stifle free trade and open competition, or because they may tend to restrict the application of new technology and learning of potential benefit to the public.

But these considerations seem irrelevant here. There is no overriding public interest in encouraging competition with the government in its performance of governmental tasks; the kinds of activities in which high-level officials usually engage. Nor is there any established public policy -- other than those spelled out with clearly defined statutory limits such as the Freedom of Information Act -- in seeing that foreign governments have ready access to information which our government desires to protect. Indeed, one of the major problems towards which the bill is directed is to help prevent the unauthorized disclosure or use by a foreign power of information which the federal government does not wish it to have.

In summary, since no specific constitutional provision seems to be implicated, and since the traditional balancing of interests concerning private employment contracts is based upon considerations absent here, it would seem unlikely that a court would apply such a test here and strike down time restrictions which it felt were too long or not necessary.

CIVIL FORFEITURE PROVISIONS SHOULD BE ADDED

An ancient legal maxim, as well as an essential element of fair play, is that a person should not be allowed to profit from his own wrongdoing. Here one of the problems with the current bill is that it apparently makes no provision to assure

that this will not happen. This is ironic because the major impetus for the bill appears to be the public outcry resulting from the perception that a former high official is getting very rich by improperly and perhaps even illegally trading on his connections rather than his competence.

There are many reasons why a former official clearly guilty of violating the proposed bill would never be prosecuted. These include political pressures and favoritism, limited prosecutorial resources, alternative law enforcement priorities, etc. Even if prosecuted, a plea bargain and/or a "slap on the wrist" sentence are all too often the result. In all such cases the criminal is allowed to keep the spoils.

Here one has only to remember the public outrage when former Vice President Spiro T. Agnew was allowed to "cop a plea," to go scot free, and to keep all of the money he had admittedly taken illegally. In that situation my law students initiated a novel legal action which eventually forced him to repay that money to the State of Maryland. But the suit was fraught with major legal problems, and such suits to recover the illegal profits of those who violate the proposed bill are unlikely to succeed absent express statutory authorization.

Another major problem of relying solely upon the criminal process is the difficulty of prosecuting such cases, as the testimony to date amply demonstrates. Generally, proof must be by the very high standard of "beyond a reasonable doubt," scienter must be clearly established, and the defendant enjoys a Fifth Amendment protection from discovery, a right to a speedy trial, etc.

Thus the alternative of a civil proceeding makes some kind of effective legal action much more likely, thereby substantially increasing not only the deterrence, but also the chance that the wrongdoer will not profit from his wrongdoing. Many other statutes, of which R.I.C.O. and the "Son of Sam" laws are probably the best known examples, incorporate civil penalties and/or are designed to prevent criminals from profiting from their wrongdoing. Considering the magnitude of the problem, the

public outrage from former officials enriching themselves by profiting from their former positions, and the demonstrated difficulties of relying solely upon criminal prosecution, the addition of a civil forfeiture provision would seem to be more than warranted.

PRIVATELY-INITIATED ACTIONS SHOULD BE EXPRESSLY PROVIDED

Although expressly providing for civil forfeiture actions will help to make the bill more effective, it will not deal with two remaining serious problems. The first is that, regardless of the ease of civil prosecution and the availability of strong evidence, legal actions may nevertheless not be brought by the Justice Department either because of political considerations or differences in enforcement priorities.

In cases of a popular president who serves for two terms, or even of a high-level official who leaves early in the administration and violates the proposed law while his party and his close associates remain in power, it is easy to see how the Justice Department would be very reluctant to initiate even a civil action against the violator. Moreover, their unwillingness to initiate either a criminal or a civil action in the face of what seems to be strong evidence, and the present state of the law in which the Justice Department cannot be forced to seek the appointment of an Independent Counsel to investigate, see Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir en banc 1984), would provide no remedy for the feelings of public outrage this bill is designed to deal with.

Another major problem would be one of obtaining the information necessary for enforcement. Even assuming for the sake of argument that the Congress adopts detailed reporting provisions which will apply to former high-level officials years after they leave federal employment, no less than half-a-dozen different highly publicized situations in the past few years alone have indicated the very significant weaknesses of relying solely on mandated reports.

The only other alternative would be detailed federal investigation of all former high-level officials for years after

leaving office. This obviously would not only be prohibitively expensive, but would also create too many opportunities for abuse, harassment, etc.

Another alternative would be to adopt the same remedy incorporated in the federal government-fraud, water-pollution, and other statutes under which private parties may initiate civil actions if the government refuses to do so. This remedy has a number of advantages.

First, because the initiator is eligible to receive a small portion of any amounts recovered, there is a strong incentive for citizens to assist in uncovering evidence of wrongdoing.

Second, such actions provide an alternative in situations where prosecutorial officials refuse to bring meritorious cases because of political pressures, different enforcement priorities, and other factors extraneous to the merits of the situation.

Third, since the public will know that such actions are possible, it will dampen if not quell the public outrage which otherwise occurs when facts apparently crying out for legal action appear in the public press yet the Justice Department refuses to act.

To those who worry that such a privately-initiated cause of action could be abused, there are several answers. The first is that our courts have numerous remedies not only to dismiss frivolous and vexatious suits in their very early stages, but also to punish those who bring them.

The second answer is that there has been virtually no abuse concerning other statutes which similarly incorporate "private attorney general" provisions.

The third answer is that, to guard against any such abuse, Congress could require that any such privately-initiated actions must plead specific factual details relating to the alleged offense, and/or that the complaint must be accompanied by sufficient documentary evidence in the form of affidavits or otherwise to present a prima facie case. Such a provision would require the plaintiff not only to know the facts but also to be in

a position to prove them even before the suit can be initiated, rather than relying upon vague "upon information and belief" pleadings, and hoping that a "fishing expedition" type of wide-range discovery can eventually uncover evidence of wrongdoing.

In summary it is respectfully suggested that the Committee consider adding to the present bill a section providing for a civil action to recover for the federal government any money a person receives while acting in violation of the statute. Such actions should ordinarily be initiated by the Justice Department, but provisions should be made, incorporating appropriate safeguards, for such actions to be initiated by private persons in situations in which the Justice Department refuses to take action.

The CHAIRMAN. Thank you.

Professor Banzhaf, one suggestion has been to apply restrictions of S. 2334 to newly hired employees only. What would be the constitutional implications of such application as opposed to applying the restrictions to present employees?

Mr. BANZHAF. I think if the Congress were to apply these restrictions to people currently in office, it would create a possible problem which can be avoided, possible problems of bill of attainder of ex post facto, a problem which can easily be avoided simply by having the restrictions apply only to people who remain in office a reasonable period after the bill is passed. In this sense they have accepted, they have consented to these restrictions by remaining on the job, and it seems to me also an important distinction which is overlooked by many, is that then the Government is not acting in its governmental capacity alone, that is its police powers, but, rather, as an employer.

We know that any employer has a freedom to restrict future activities of his employees. This is limited in some cases by public policy considerations such as competition or not to disclose new technology. These do not apply, so it seems to me that the Government would have much more scope to apply it only prospectively. Here, though, one word of warning.

I have not investigated, but it seems to me there might—and I would emphasize the word "might"—be a constitutional problem if the restrictions are applied to elected persons, that is, the President, the Vice President, or Members of Congress, who are still serving their terms. In a sense, to a Senator, for example, who has just been elected, to tell him if he does not leave office in 6 months he will not be able to do this and this tends to affect his term of office, some might say even his expectation of future compensation, and that interferes not only with whatever rights he might have, but arguably with those of the voters. So as a transitional thing, it might be advisable to have the bill apply only to an elected representative coming in, rather than one who is already in office, but I have not researched that. It is a thought that occurred to me as I looked at the draft bill yesterday.

The CHAIRMAN. Professor Banzhaf, how, if in any way, does S. 2334 violate the first amendment?

Mr. BANZHAF. I do not believe that it violates the first amendment, and I would go further to say I do not believe there is even a serious argument that it violates the first amendment. That is, I have not looked at it and concluded that it is a close issue and came down on the side of constitutionality. Rather, as I look at it, there are no serious constitutional issues because so long as the restriction applies only to people who do these activities for a fee, in effect the bill is only prohibiting being paid for, not the activity.

To be more precise, a former Government official can go out, he can come before the Congress, he can come before any agency, he can plead on behalf of any cause, he can plead on behalf of any government, provided only that he is not employed to do so. It is not the speech or the association or the petition for redress of grievances which is being in any way restricted. It is only the right to earn money by doing so, and I think therefore based upon the

case cited and the examples I have given both here and in my testimony, there is no serious first amendment issue.

The CHAIRMAN. Senator Mathias.

Senator MATHIAS. Now, Professor, do you have a copy of the bill before you?

Mr. BANZHAF. I have a copy of the bill I received yesterday. I believe it is the current one.

Senator MATHIAS. Would you look on page 4, "Whoever, having been employed," and so forth, "is employed by or advises, represents or assists in any way, directly or indirectly, a foreign entity." That does not say anything about fee.

Mr. BANZHAF. That is correct. One of the comments I was going to submit later, since I have not had a chance to review the bill in detail, is that in some sections of the bill the requirement for gain or remuneration is missing, in others it appears. It is missing on page 4, although it applies to another situation. It is missing in the middle of page 3.

Senator MATHIAS. So that language that I just directed your attention to on page 4 would affect your previous answer?

Mr. BANZHAF. Very definitely. I was advised by the staff that the question they wished me to look at was whether or not employment or compensation for gain could be restricted. It was my understanding that would be in the bill. If it is not in the bill, then I would be much more likely to side with the ACLU. There you are directly restricting somebody's freedom of speech, that means that it has to meet the various onerous requirements of strict scrutiny as narrow as possible and so on. That is why I disagree strongly with the ACLU's view that there is no difference by putting in the gain or remuneration requirement or leaving it out. To me, that is the key and what it allows the Congress to do is to pass a bill which is broad enough that it protects not only those situations where the evils that we fear directly have occurred, but broad enough to be prophylactic and to deal with the many problems involved in any kind of criminal prosecution where you have to have proof beyond a reasonable doubt.

Senator MATHIAS. I think that is clear. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. Any more questions?

[No response.]

Thank you very much, Professor.

Mr. BANZHAF. Thank you.

The CHAIRMAN. Our next witness is the Honorable Benjamin R. Civiletti, partner of Venable, Baetjer, Howard & Civiletti, former Attorney General.

Come around, Mr. Civiletti. I believe Mr. Cutler is in this same panel. Mr. Cutler, come around. You gentlemen may proceed. Mr. Civiletti, do you want to proceed?

STATEMENT OF BENJAMIN R. CIVILETTI, PARTNER, VENABLE, BAETJER, HOWARD & CIVILETTI, AND LLOYD CUTLER, PARTNER, WILMER, CUTLER & PICKERING

Mr. CIVILETTI. Thank you, Mr. Chairman. It seems to me that there are two evils which this bill addresses: One, the misuse of po-

sition while in the Government to pave the way for private gain after Government service or the perception, in effect, of some disloyalty, and, perhaps the greater evil, the misuse of special knowledge or association gained in the public trust for private interest after Government service has ended or the perception of the abuse of the public interest.

There is a tension between those two evils and, of course, the right to be gainfully employed, the disincentives to good people joining service, and, third, and probably secondary, the benefit generally to the public and to the Government of having knowledgeable and good people represent private parties with integrity.

In trying to design a remedy or amend remedies which deal with these tensions and yet still address the evils, we have to try to make sure that the evil is met by the prohibition or the prohibition cures or protects against the wrong.

Second, for understanding or acceptance and for enforcement, we ought to try to keep the prohibitions or the remedies simple. We ought to try to make sure that distinctions which are made are meaningful and necessary and not based on prejudice or protectionism or some other basis.

And last, it seems to me generally, as a matter of common sense, that legislation which is so wide-reaching ought not to be based on isolated or rare phenomena, but on a generic problem.

I have about four or five observations to make with regard to the proposed amendments. Generally, I do not believe that the present law operates effectively, and I think it ought to be changed. I do not agree with the breadth and scope of the proposed amendments, but I think the direction that they take is proper.

No. 1, because it takes time to gain special knowledge or associations in Government service and because that knowledge and those associations are perishable, it would lead me to suggest that the application of any of these prohibitions as to a Government employee be at least to an employee who has been in Government service for some period of time, that is for 6 months or so. This avoids the problem having the prohibitions unnecessarily apply to special Government employees who may be very valuable to perform a special short-term service or to people who are in Government for a very short time and who have not gained the special knowledge or the associations about which we are truly concerned.

Second, the periods of prohibition should vary between 1 and 3 years based on how central the prohibitory area is to the performance and knowledge which the employee had while in the Government: The more remote the connection and the lower in exposure or responsibility the Government official, the shorter the period of time; the closer the nexus and the higher the Government official, the longer the period of time. But it seems to me that because of the perishable nature of the association and the perception of misuse or paving the way aspects, 1- to 3-year prohibitions are more proper than, as the bill provides, I think 5 and 10 years in some instances.

It seems to me that any individual appearing in a judicial proceeding ought to be exempt from these prohibitions. Judicial proceedings are open by nature. The judicial process is determined by

merits and arguments and the law and not by influence or association or special entre. Everybody has access and right to the courts.

It seems to me that one of the areas that the present law does not reach far enough and which I would recommend your serious consideration is in the type of communication prohibited. It seems to me curious that a former employee cannot directly in most instances communicate or act on behalf of a client in certain prescribed areas, but so long as he shields himself through a puppet of some nature or kind, he can command or direct or design influence based on the very same associations and special knowledge.

I would suggest that consideration be given to extending the prohibitory language to read for example, "directly or indirectly with the intent to influence makes or directs any oral or written communication, personally or through others." That way I think the disguised or shielded violation of the trust by the misuse of special knowledge or position is better protected.

Thank you very much.

Senator MATHIAS [presiding]. Thank you very much, General Civiletti.

Mr. Cutler.

STATEMENT OF LLOYD CUTLER

Mr. CUTLER. Senator Mathias, I do not have a prepared statement. I did have the honor several years ago of delivering the Robert T. Jones, Jr. Memorial Lecture on Ethics at the Emory Law School, and much of which is about this subject, and I would be glad to submit that for the record.

Senator MATHIAS. We understand the pressures under which you are here, that you have been out of the country and have just returned and we appreciate your being here at all, with or without a prepared statement.

Mr. CUTLER. I am very pleased to be here. I would make just a few points. The first is that one of the most valuable principles of our unwritten constitution, I suppose, is the principle of the citizen statesman, like Cincinnatus, who left his farm to take up arms for the republic in Rome. Our Revolutionary War officers thought enough of that principle to call themselves the Society of the Cincinnati, which lives on to this day, and we have had a tradition of citizen statesmen, men who leave private life to answer a call to Government service, return again to private life, return perhaps later in their careers to Government service, and so on. It is sometimes disparagingly referred to as the "revolving door," but it is a very important and very valuable principle.

Think of men like Elihu Root, Henry Stimson, Douglas Dillon, Cyrus Vance, John McCone, the Dulles brothers, Jack McCloy, Robert Lovett, and the distinguished Attorney General on my right. Nobody ever raised the slightest question about the propriety of anything that any of them ever did after leaving public service. They were people who, in Senator Biden's words, had some class, and just like Bobby Jones, called the close questions against themselves.

It is terribly important that we keep that principle. Men like that who have experience both in Government and in private life

are better Government servants, public servants, for what they do in private life and they are better private persons, better able to inform the private community about how to deal with the Government, because of their Government service.

They live by a standard that you cannot write into any law, which is essentially how would you like to read about this tomorrow morning on the front page of the New York Times or the Washington Post. And if you would not like to read about it, you do not do it, whether or not it violates the law.

It does seem to me—and I think I disagree with Attorney General Civiletti about this somewhat—that the substantive standards of the present rules strike a pretty fair balance. They were worked out originally some 25 years ago, shortly after the famous Dixon-Yates episode, I believe, by a very competent committee led by then Dean Bayless Manning of the Stanford Law School. They have worked I think quite well as substantive rules. They work very badly as rules of the criminal law. They all involve very complex questions. People who leave Government service and get into situations like this, usually take legal advice. It is very, very hard for the Government to win a conflict-of-interest case under any of these laws because of the high standards of the criminal law. I doubt if the Government has won more than one or two ever since these laws were first on the books.

We had the recent case of former Assistant Secretary of the Navy Sawyer, where I think the jury was just out for a couple of minutes before it brought in a not guilty verdict.

Public disclosure is a much more effective remedy than the criminal law, and we are seeing that today with respect to some of those whose activities have come under critical attention.

Much better as legal remedies, it seems to me, would be civil remedies, as you raised yourself earlier, Senator Mathias, such as following the principle of the *Dixon-Yates* case, the *Mississippi Valley* case in the Supreme Court, entitling the Government both to set aside any sort of decision that was made that arose out of a violation of the conflict of interest laws by someone on behalf of the entity dealing with the Government.

Similarly, it would be very appropriate I think to entitle the Government to seek a forfeiture of any fees received for conduct that violated the conflict of interest laws. If we are going to make changes in the laws, those are the changes I would make in them.

The one change I would not make, which this bill seems to concentrate on so strongly, is to draw some special circle, a forbidden tainted circle, about a former Government official acting in any way on behalf of a foreign government or entity. It seems to me that is quite wrong. We are living in a more and more interdependent world. Our laws now affect the governments and the companies and the private citizens of most other countries in the world. Think of our trade laws. Think of our export control laws, our currency control laws, the laws that are aimed at stopping the flow of illegal money around the world. Think of the antitrust laws. Foreign companies, foreign governments need to deal with the U.S. judicial system and the U.S. administrative system, and they need the assistance of lawyers and other expert advisers to do that.

There is no reason why they should be separated and branded somehow as entities which are not entitled to the same services as American citizens and companies and are forbidden to retain the type of citizen statesmen I mentioned earlier, the Stimsons, the Roots, the Vances of the world, all of whom would be in immediate violation of this particular new bill.

That is really all I have to say.

Senator MATHIAS. Thank you very much, Mr. Cutler. I think the committee is very fortunate to have both Mr. Cutler and Mr. Civiletti with us today. They not only bring with them a distinguished record of public service, but they also have had experience in private practice and so they are prepared to address both sides of the question that Senator Biden asked.

Now, let us assume that this bill in some form is passed, whether as originally introduced or as proposed to be amended. Putting on your Government hat, how do you think it would affect the ability of the Government to recruit and to retain competent, qualified employees, people who have to look down the road of a career in law?

Mr. CIVILETTI. Subject to some modifying, some moderating amendments as to time periods, I think it would have no effect on presidential appointees. I think it would have very little effect on those even perhaps in GS-15 and above.

As to young people, the best of whom we desperately need in Government, I think that raises a different question. I think Senator Biden's question to the previous panel is a good one. It is not the limitation as to a certain type of representation that would inhibit the employment of young people in economic firms or in advertising firms or in law firms, but it is the broad disqualification of the entire firm or entity or the broad prohibition against doing any type of Government representation work because of prior employment that creates a problem.

So long as you focus the nexus and make the time period between the employment and the prohibited activity short enough and exempt the disqualification that might otherwise arise not of the individual but of the entire entity, then I think it would have a minimal effect on even the young people.

Senator MATHIAS. What would you say, from a Government point of view now?

Mr. CUTLER. I have not seen the amendments of the bill, but looking at the present bill, if that had been the law when I was asked to take a Government position in 1979, I would not have taken it and I would advise any young lawyer at least who wished to have a career of mixed public and private service not to start by entering the Government because of the unworkable provisions of this bill.

The present law is difficult enough, Senator Biden and Senator Mathias, for a young lawyer who has worked in the Government or who is asked, say, after he has been in a law firm 3 years, to go to work some place in the Government and has in mind returning either to his old firm or to some other law firm later on. These prohibitions are so sweeping, these prohibitions I take it would abolish all cocktail parties, among other things. You cannot speak to a Member of Congress—

Senator BIDEN. Is it that bad?

Mr. CUTLER. How are you fellows going to raise any money?

Senator BIDEN. Is it that bad?

Senator MATHIAS. That is bad. [Laughter.]

Senator BIDEN. That is not bad. Then we would have to have public financing.

Senator MATHIAS. Then that is good.

Senator BIDEN. That is right.

Mr. CUTLER. You could not even appear in a Federal court.

Senator MATHIAS. Putting on your hats now as private practitioners, and as members of very distinguished firms, if this bill is enacted, some of these young lawyers who have been in public service of one kind or another could be excluded from whole areas of practice. International business transactions would be an obvious one. Immigration law, this would wipe out the immigration bar, I would think. Representation of United States subsidiaries of foreign owned companies—we are talking now of the 2-year prohibition—but how would this affect your hiring practices? You have answered that in part in your earlier answer, but suppose you are on the hiring committee of your firm, what problems do you—

Mr. CUTLER. Our firm, like Mr. Civiletti's firm, are very anxious to recruit in particular the law clerks of Federal judges because they usually are the stars of their law school classes and their skills are enhanced by their time of service as clerk to a Federal Judge or Supreme Court Justice. Under these rules, it would be a very, very difficult thing to do. They would, as you say, be barred from whole areas of practice and, in addition, they would be barred from even having anything to do with anyone else in the law firm relating to matters, even new matters arising in their former court.

Mr. CIVILETTI. A similar type of response to the governmental side. Depending on the breadth and the length of time of the prohibitions, they form a handicap to employment by former Government people or by young people coming to law firms or other entities or firms.

To the extent that they are narrow and of short duration, then they are not much of a handicap, and they are also not a handicap the other way around, either from the firm's point of view or the Government's point of view in that both in Mr. Cutler's firm and in mine we encourage and preach and believe in public service by the people who are already in the firm. We encourage them to leave the firm for periods of time and devote themselves to public service of their own choice of whatever nature or kind. That is, of course, the wider, broader and longer you make such prohibition, then that commitment as part of the license to practice law.

Senator MATHIAS. Not too long ago, a very distinguished former Secretary of State was asked to conduct a survey by a foreign company of whether or not its products conformed to the standards of the World Health Organization. I presume this was done as a confidence-building measure of some sort. Now, that incidentally would be a criminal act if it were done under the provisions of this bill, as I read it. Now, do you think the national interest of the United States requires that a former Cabinet officer be precluded from conducting that kind of activity? Is there any legal, moral, ethical

reason why that should not be done? Is there any national security reason why it should not be done?

Mr. CIVILETTI. No.

Mr. CUTLER. You might go back to World War II and look at the provision that barred any former high official of the Government from being employed by, advising, representing, or assisting in any way, directly or indirectly, a foreign entity and what would have happened to the efforts of Robert Patterson, McCloy, and many others—

Senator MATHIAS. Jack McCloy could not have happened.

Mr. CUTLER [continuing]. To assist the allies to fight the Nazis and to advocate America joining the war. They would have been ruled off.

Senator MATHIAS. Senator Biden.

Senator BIDEN. You are good. You are good. I knew you would get the Nazis in here somewhere along the line. This bill is anti-freedom. [Laughter.]

Mr. CUTLER. If you limit it to totalitarian government, it would be all right. [Laughter.]

Senator BIDEN. Mr. Cutler, would you comment on the thrust of the suggestions made by General Civiletti, about how your view might or might not change if the time and duration and the judicial exception, three of the suggestions that he made, were incorporated? Would that alter your view?

Mr. CUTLER. Well, I think they are all certainly in the right direction. It gets to be a better bill. But the present conflict of interest laws are very strong and strike a very fair balance. Senator Thurmond asked earlier if they are that good why do these things happen.

Well, the things that are on our mind at the moment may or may not violate those laws. We have not found out yet. We have got an independent counsel now to find out whether that is true or not.

Making them criminal laws, stacks the cards against the Government from the beginning. It is a terribly high hurdle, to make a criminal case, as you said earlier, for this sort of conduct which is not malum in se. It would be much better to have your remedies, other than publicity, registration, disclosure, et cetera, be of a forfeiture nature. The Government can either change its decision in favor of a particular entity if that entity's agents violated the statute, or the Government could seek a return of the fees that were received. Those would be far more effective remedies and they might make not only foreign governments but domestic entities think again before retaining some of these very visible people in very close cases, that is, cases that raise close legal and ethical issues.

Senator BIDEN. Back to the question that Senator Mathias raised about hiring practices by your firms and similar firms: I raise the question, assuming that there were more restrictive prohibitions than now exist, but less restrictive than proposed by the legislation, it would seem to me the same quality people who you would ultimately want in your law firm would be the same people who would benefit from having served in a Government capacity, notwithstanding the fact that they might not be able to directly bene-

fit your firm as rapidly and as immediately on specific pieces or areas of expertise that they may have worked on. Nonetheless, the totality of the improvement in the breadth and scope and capability of a young lawyer would be sufficient, notwithstanding the fact that they would have been prohibited or would be prohibited for a duration of time, for 1 year or 2, or even 3, from participating in your firm's activities relating to the Agency from whence they came.

Mr. CUTLER. Well, that is true already, Senator Biden. They are prohibited already from dealing with the entity from which they came for 1 year, they are prohibited forever from dealing with any entity in the Government on a particular matter on which they have worked or advised while they were in the Government.

People seem to forget that we have a pretty good set of rules already. It is a question of whether you want to introduce the types of absolute bans that are in here, that you can never work for a foreign entity. A foreign entity includes British Airways that gets sued in our courts, it includes all of the foreign banks, it includes all of the Japanese companies that are building plants in the United States.

Senator BIDEN. Under the proposal you made, Mr. Civiletti, about the judicial exception—let us take the British Airways suit in American courts—under the proposal that you were making as I understood it, I assume that representation of British Airways in the Federal court, because in fact the court system is open, there is access, would be something you would suggest be exempt; whereas, the representation of British Airways in landing rights at Kennedy Airport—we are dealing with an agency—is something that would not be exempt.

Mr. CIVILETTI. Exactly.

Mr. CUTLER. But is that a reasonable distinction?

Senator BIDEN. Pardon me?

Mr. CUTLER. Is that a reasonable distinction?

Senator BIDEN. I think it is reasonable. The reason I think it is reasonable—and I will let Mr. Civiletti speak for himself as to why if he agrees or not—is that the thing that is raising the most concern is what people do not see. They assume that a lot of things are taking place in agencies, at cocktail parties, out on golf courses, and in offices of GS-15's that are influence peddling; whereas, when you are in the court system, everything you are doing is there to be seen. There are papers filed, there are motions filed, petitions filed, there are hearings with judges sitting there on a bench looking down at the lawyers in question, there is not the aura or the notion of whether or not you do not take the judge to lunch. If you take the judge to lunch, you get disbarred. But you take the GS-15 who signs off on the report to the Secretary to lunch, the impression—I am on impressions now—is that may impact. People think there is nothing wrong with taking that GS-15 to lunch. So there is a real distinction in my view between the judiciary—because it is open, because there are laws that extend well beyond the ethics laws governing you and me as attorneys, beyond the Government ethic laws, there are canons of ethics in each of our States and the Federal bar—and then there is how we deal around here with making sure that the GS-12 gets an invita-

tion to the Orioles game. If you send an invitation to the judge you have got yourself—you are in deep trouble.

I would like to raise the level of that influencing of people, to that GS-15 being treated like the judge. It seems to me that what I am looking at here—and I agree, this legislation as drafted, I will not vote for—but what I am trying to do is from my perspective to raise the standard for those in Government who deal and make significant decisions to the same level as we expect of judges, for example. That is the direction I want to see this move, and so I think there is a real distinction between representing British Airways in a civil or criminal suit within the Federal judicial system and representing them on landing rights that is an administrative decision and in many cases a political decision with some Senator or Congressperson or—

Mr. CUTLER. Let me put—

Senator BIDEN. I am not saying that you agree, but—

Mr. CUTLER. Are you saying it is all right for Pan American but not British Airways?

Senator BIDEN. Well, I am saying that in fact—

Senator MATHIAS. If you will yield just for one distinction on this.

Senator BIDEN. You saved me from answering the question.

Senator MATHIAS. You cannot represent them through the administrative process, but the minute there is an appeal from the administrative process to the courts then you can represent them.

Senator BIDEN. For the reasons I have just stated.

Mr. CUTLER. Well, your point is very well taken. You should not take the official to lunch. It is still impossible—there is no law about it, but the SEC has made rules it has enforced for 40 years—you still cannot take an official of the SEC to lunch. Every other agency could do the same thing. You could pass the same sort of law if you want to.

But we have an Administrative Procedure Act, we have what amounts to judicial separation in let us say a route case before the Secretary of Transportation in which British Airways has just as much legitimate interest as Pan American Airways or American Air Lines, why should not each of them be entitled to the same level of representation?

Senator BIDEN. By the way, I am not sure I agree with that proposition. They have the right under our laws to the same access to the legal system, also, by the way, we pass laws here every day that make it whole heck of a lot harder for foreign entities to do things that domestic entities can do, as I might add, the British and the French and the Japanese and the Germans and every other country in the world does in reverse. So I do not buy that internationalist argument that, you know, what is good for Pan Am is good for British Airways. What is good for Pan Am is good for American Air Lines. What is good for Pan Am may not be good enough or may be too good for British Airways. I do not have any restrictions—just so you know, I do not have any problem saying “tough” to British Airways, because British Airways and the way in which the British deal with us, I need not remind you, is something less than you would call evenhanded.

Now, if we want to start talking about reciprocity in how people are treated under the law, I do not have any problem. I do have a problem saying that a British entity does not have the same protections under our Constitution as a general proposition, but for the fact of legislation exempting them or preventing them from access. But I do not have any problem saying, by the way, "British Airways, you've got to do it a different way than Pan Am has," just so I do not kid you about where I am with British Airways or any other foreign entity.

Mr. CIVILETTI. I think there is a sense of both being right here. I see it as a distinction between using a hammer perhaps and a sledgehammer on the foreign influence. I do not think the sledgehammer is necessary or desirable, but I think the hammer which is of a greater weight than, say, a tack hammer can be legitimately used on foreign influence because I think there is a public perception, at least, or suspicion that in representing a foreign government body entity, that their interest is going to be adverse to the United States interest. Therefore the public official's access, influence and special knowledge is particularly offensive, and consequently the prohibition can be slightly stronger to meet that perception, whether or not it is a reality.

Mr. CUTLER. With respect in an international trade case as to whether there ought to be higher tariffs on steel or automobiles, I think it is presuming an awful lot to say that the position of General Motors or of United States Steel is more related to the public interest of the United States than the position of its competitors abroad; that is, that it is in the public interest of the United States to allow these imports, not to keep them out.

Senator BIDEN. Correct. But you just made the point—

Mr. CUTLER. And why should they not be allowed to have Ben Civiletti but not the other side?

Senator BIDEN. Because one is an American and one is not, and the reason why is—

Mr. CUTLER. Do you think that is a tenable, even a constitutional distinction, Senator?

Senator BIDEN. I think it is. We will hear from the ACLU on that point, as we heard from others. I think it is tenable. I think there is clearly a precedent for having a domestic concern given more—not more basic rights but given more access and fewer limitations within the system than a foreign one.

Mr. CUTLER. American Motors is majority controlled by Renault, a French state company.

Senator BIDEN. Now you are raising a different question. The different question is what constitutes a foreign entity. Do not confuse apples and oranges here. What constitutes a foreign entity is a serious problem. But we were talking about—assuming we agree that there is a foreign entity, assuming one exists—can the law make a distinction between the prohibitions or access that the foreign entity has and those a domestic entity has. My answer to that is, constitutionally it can, substantively it should, and politically it is necessary.

Now, that is different from the first issue of whether or not they constitute a foreign entity. In light of the notion and development of multinational corporations, I always find it—remember the

famous phrase during the Carter years, "our" multinationals? I do not know who in heck "our" multinationals are. I mean that is a completely separate issue, a legitimate issue, one which I have grave concern about. I just want to make clear we understand at least what I am saying.

I subscribe to the Civiletti tack hammer-hammer-sledgehammer distinctions and the legality of being able to make those distinctions, the political significance of it, and I might add the necessity on occasion.

And again, I would just point out, as you know better than I—I have only been on the Foreign Relations Committee for 12 years and on the Intelligence Committee for 10 and dealing with our foreign competitors in various fields on such things as transfer of technology, access to markets, landing rights—we have—and then I will stop, Mr. Chairman—we have had a problem since World War II. Prior to World War II, we had been in the unusual position that our economic competitors had also been our political adversaries and we used to have no problem making economic and foreign policy distinctions.

Today, our economic adversaries are also our political allies; it is a necessity to have them as our allies, and we have always erred on the side of the internationalist—not always, mostly—on the side of suggesting the foreign policy consideration is more important than the economic consideration. But that is another question. The point is, they make distinctions. They make clear distinctions. They make distinctions in their courts, they make distinctions as to representation, they make distinctions in terms of their treatment. I do not have any problem with us making similar distinctions.

Senator MATHIAS. Well, there should be some comfort in dialog for the distinguished panel, because apparently Senator Biden considers that we will be giving a decided advantage to a domestic corporation to be represented by the likes of you—

Senator BIDEN. It clearly would.

Senator MATHIAS [continuing]. And it would be a deprivation to a foreign company if we prohibited you from representing them.

Senator BIDEN. I think that is absolutely true.

Mr. CUTLER. I am afraid he is suggesting that we have some unfair edge that he is willing to let an American company have but not a foreign company.

Senator BIDEN. It is purely your professional intellectual capability I wish to deny them. It is sort of the transfer of technology, in the same category. [Laughter.]

Senator MATHIAS. Let me ask you two quick questions. One, if this law were adopted and one of your middle-level lawyers in your own offices came to you and said what is your personal professional advice, should I go to work for the Justice Department or the State Department, how would you respond?

Mr. CIVILETTI. Are you referring to this law, without substantial modifications?

Senator MATHIAS. Yes.

Mr. CIVILETTI. I would say that if you want to stay there and work there for a very long time, then you go ahead, but if you want to come back into private practice within 2 or 3 or 4 years,

then it may be very troublesome to you. You had better think about it long and hard.

Mr. CUTLER. I would give the same answer.

Senator MATHIAS. One final question, which does not relate directly to this bill, but to the area, since we have opened up this whole area. As I understand the present registration and reporting laws, they are not very adequate. If a lobbyist who is registered as a lobbyist, whose name is on the books in the Secretary of the Senate's Office or the Clerk of the House's Office, takes somebody out to lunch, all he has to do is report that he took somebody out to lunch and spent \$49.92.

Senator BIDEN. It means that it was not a lunch in Washington, if it was \$49. [Laughter.]

Senator MATHIAS. Would it be desirable that he say they took a staff member of the Senate Judiciary Committee or whoever it was and they discussed this lobbying bill?

Mr. CIVILETTI. I do not think——

Senator MATHIAS. Should disclosures go that far or is that——

Mr. CIVILETTI. I do not think so. I think to, even if it would pass constitutional muster, it begins to have the chilling effect of inhibiting all kinds of access and discussion and debate and information in a process which ought to be open and freely available yet have certain confidential or private aspects to it as determined by the legislators or by the people on behalf of constituencies. And the reporting requirements are so voluminous, the information which is already contained is so detailed that they are almost stripped of any effective kind of prophylactic purpose, and rather become a basis for either tidbits or titillation in the media or tripping someone up who is under scrutiny for some other purpose. Then these are examined to see if there has been some inadvertent failure which can be added to the scales to disparage the person.

So my own sense is that it would not be desirable as a policy matter or effective as an enforcement matter.

Mr. CUTLER. I agree with that. Certainly, the principle of disclosure is a very valid principle, the more sunshine the better. We have got so many forms to fill out already, and people start inventing ways around them, just as the Congress invents ways around your own sunshine laws, and how do you accommodate a system like that with the high volume of social intercourse that goes on in a city like Washington.

Senator MATHIAS. Gentlemen, thank you very much for being with us.

Mr. CUTLER. Thank you.

Mr. CIVILETTI. Thank you.

Senator BIDEN. This was very helpful. Thank you.

Mr. CUTLER. It was our pleasure.

[Aforementioned material follows:]

The Robert Tyre Jones Jr. Memorial Lecture on Legal Ethics

Emory University Cannon Chapel
November 24, 1981

"As a young man, he was able to stand up to just about the best that life can offer, which is not easy, and later he stood up with equal grace to just about the worst."

Herbert Warren Wind



Bob Jones applied moral standards not just to the choice of ends, but to the style and manner of pursuit. A sense of proportion gave authority to his judgment as a lawyer. Although possessed of a gift for expression, he listened as well as he spoke. His presence conveyed grace, humor which sparkled into contagion, and an unbounded enjoyment of friendship.

To his friends he proved that affection and courage could elevate life and enrich a relationship beyond measure.

Born — March 17, 1902
Died — December 18, 1971

CONFLICTS OF INTEREST*

Remarks
of
Lloyd N. Cutler**

When John A. Sibley gave this lecture, he referred to a drawing in Bobby Jones' law office with a little couplet: "When the one Great Scorer comes to mark against your name, he writes not that you won or lost, but how you played the game."¹

I am more of a tennis player than a golfer. We are now in the 1980s, rather than the 1920s. Both these facts may explain the somewhat different couplet that appears on a Snoopy poster my children recently gave to me. It shows Snoopy on the tennis court, with his cap on sideways and his racket gripped firmly in both front paws, with his partner standing indecisively beside him and two determined opponents on the other side of the net. The caption reads: "It doesn't matter whether you win or lose, but how you place the blame."

I suppose Bobby Jones' greatest quality was that he never put the blame on others, and always called close questions against himself. That quality is central to my talk tonight.

At a recent annual alumni gathering at the Yale Law School, A. Bartlett Giamatti, Yale's new president, noted that, according to the *Chronicle of Higher Education*, the nation's degree-granting institutions last year awarded 7,000 degrees in divinity, 15,000 in medicine, and 35,000 degrees in law.² He recognized the many contributions all three professions make to the spirit, the health, and the equity of our society. But he asked us if we could explain why so large a percentage of the nation's best young minds were becom-

* Robert Tyre Jones, Jr., Memorial Lecture on Legal Ethics, Emory University School of Law, Nov. 24, 1981.

** B.A., 1936, LL.B., Yale University, 1939. Mr. Cutler is a partner in the Washington, D.C. law firm of Wilmer, Cutler & Pickering. In 1979-80, he served as Counsel to the President.

¹ J. SIBLEY, THE STRENGTH OF ETHICS 15 (Robert Tyre Jones, Jr., Memorial Lecture on Legal Ethics, Emory University School of Law, Mar. 29, 1979).

² *Chronicle of Higher Education*, Oct. 14, 1981, at 10. President Giamatti's speech appears in the Yale Law Report (Spring 1982).

ing lawyers instead of medical doctors or divines.

President Giamatti said he had no doubt there must be something lawyers do for the rest of us that now makes our profession this favored, but that he did not know what it was. He challenged us to explain, and warned that public respect for lawyers might decline if the explanations were not convincing.

President Giamatti's question is worth pondering. His figures are confirmed by a number of other arresting statistics. Japan has only 10,000 lawyers, or one for every 10,000 people. Western Europe averages one lawyer for every 1,500 people. We have over 500,000 lawyers, or one for every 450 people.

One is tempted to conclude that the super-efficient Japanese must know something. They do—their culture places the highest value on consensus, while ours places the highest value on dissent. For the Japanese, it is a confession of failure to sue or be sued. For us, it is a demonstration of firmness and virility. We Americans have more faith in laws, regulations and litigation to solve social and economic problems—whether national or personal—than any society on earth. And that is why one in every 450 of us, or one in every 200 in the work force, is a lawyer. I once made a calculation that in the District of Columbia, one in every thirty people gainfully employed is a lawyer.

I have another private statistic. By my rough calculation, the 1980 gross national product of the legal profession—the compensation of all lawyers plus their support staffs—is in the range of \$30 billion, or about 1.4 percent of the national GNP. That is higher than the GNP percentage of the electric power industry or the aluminum industry, and comes close to the money compensation of all the nation's farmers. It is exceeded only by a very few of our largest industries, such as oil, automobiles, data processing and steel, and by health care. Law school graduates are now paid more than anyone entering the work force. There are probably more lawyers earning six-figure incomes than in any other profession, or in the entire business community, or even among professional athletes.

Now these are figures which I suppose should make all lawyers proud. But if they were widely circulated, do you think it would

please our clients, or the public as a whole? Would it convince them that legal services have more social value than other industries and professions which account for lower percentages of GNP? More likely, it would bring President Giamatti's skeptical question to the front of their minds.

What is it about our profession that has always made the rest of society uneasy? Despite our commitment to the service of others and to the noble principles of equity and justice, we have been held in low repute since the days of Shakespeare. Daumier's drawings and Dickens' descriptions of lawyers are biting, to say the least. Thomas Jefferson said: "It is the trade of lawyers to question everything, yield nothing and to talk by the hour." Charles Lamb wrote: "He is no lawyer who cannot take two sides." Rufus Choate said that "only printers and lawyers can change white to black." Our approval rating, to use the modern pollster's term, is not noticeably higher today. At best, we might receive Lyndon Johnson's colorful appraisal of any politician he didn't care for especially; when asked what he thought of such a fellow, LBJ would say: "I hold him in minimum high regard."

I would venture to suggest that one reason we are held in minimum high regard is that we have not convinced the public of our intellectual honesty and devotion to principle. We are regarded as more canny than candid, more as servants of our prince—as mouthpieces or hired guns—than as servants of our consciences. I am not speaking of how we behave in fact—for most of us are at least as candid and conscientious as nonlawyers—but of how we appear to the public we serve.

One reason why we appear this way is our rather ambivalent attitude toward conflicts of interest, whether in public or private life. Unlike Bobby Jones, we do not always call close questions against ourselves. By a conflict of interest, I mean those circumstances in which a lawyer may be seen as having a personal or professional interest in a matter that may differ from the interests of his public or private client, or in which a lawyer may be seen as switching sides or betraying the confidences of a former public or private client. I propose to discuss three specific and current illustrations we have not managed very well: first, the conflict issues faced by pub-

lic prosecutors investigating charges of unlawful conduct by a government colleague, as during the trauma of Watergate; second, those faced by lawyers who pass through the "revolving door" into or out of public service; and third, those faced by lawyers who act as inside or outside counsel for a publicly-held business corporation.

I. "WATERGATE" CONFLICTS

Watergate was a time of crisis for the entire country, and especially for the legal profession. The President who betrayed his trust was a lawyer. Two consecutive Attorneys General were convicted of lying under oath to a congressional committee and one for obstructing justice as well. When the incumbent Attorney General correctly recused himself from the Watergate criminal investigation because his predecessor and former boss was involved, the President took over supervision of the investigation himself, even though his two closest aides were targets and he knew that he himself was a co-conspirator. We now know that he regularly passed on to the targets whatever he could learn from the Assistant Attorney General in charge of the case, and that the three of them then planned together how best to frustrate the investigation. When public mistrust of the Department of Justice became so deep that the President had to appoint a new Attorney General of impeccable reputation, Elliot Richardson, Mr. Richardson could only win confirmation by agreeing with the Senate Judiciary Committee to appoint a special prosecutor from outside the government and giving him a charter establishing his independence and continuity in office. Nevertheless, the cornered President subsequently overrode that charter and ordered Mr. Richardson to fire Special Prosecutor Cox, even though Mr. Richardson and his deputy, William Ruckelshaus, resigned rather than participate in such a disgraceful decision.³

This "Saturday Night Massacre" was of course the beginning of

³ For a succinct history of the episode, see SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 97TH CONG., 1ST SESS., REPORT ON SPECIAL PROSECUTOR PROVISIONS OF ETHICS IN GOVERNMENT ACT OF 1978, at 9 (Comm. Print 1981).

the end for Mr. Nixon. Public outrage—led I am glad to say by our profession—forced him to appoint an equally independent successor to Mr. Cox who successfully prosecuted the case against the President's aides, and forced the disclosure of the "smoking gun" tapes that proved the President's complicity and forced his resignation.

This tragic episode featured lawyer-heroes as well as lawyer-villains. The list of heroes would certainly include Archibald Cox and Leon Jaworski and their staffs, Mr. Richardson and Mr. Ruckelshaus, Sam Ervin, and John Doar. But the public is far more likely to remember the lawyer-villains—President Nixon, John Mitchell, Richard Kleindienst, John Ehrlichman, Charles Colson, and John Dean. As one test, the books written by the villains have sold much better than those written by the heroes.

As one legacy, we now have a Special Prosecutor statute, based on the principle that the Attorney General has a conflict of interest whenever there is a need to investigate whether a high executive branch official has violated the law, and that on such occasions, an independent special prosecutor must be appointed by the judicial branch.⁴

We have now had five years of experience with the Special Prosecutor statute. As time passes and Watergate fades into history, we are hearing once again that the special Prosecutor statute insults the integrity of the Attorney General, and that there is no need for such a law because an upright Attorney General can be trusted to do his duty.

I was one of the the original proponents of the Special Prosecutor statute, although I was unhappy with a number of the provisions in the final version and I have declined to accept parental responsibility for them. I and others have urged a number of constructive amendments that could be made in the law, and committees of the Congress are now considering such changes.⁵ But I

⁴ Ethics in Government Act of 1978 § 601(a), 28 U.S.C. §§ 591-598 (Supp. III 1979).

⁵ See *Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. 34 (1981) (testimony of Lloyd N. Cutler, For-

firmly believe that the principle of the law is correct, and, with respect, that those who would abolish it are wrong.

The Attorney General and his principal assistants in the Department of Justice are not simply prosecuting officers. They are also appointees of the elected President and members of an administration team that usually hopes for reelection. They have an obvious political conflict of interest when they investigate whether crimes have been committed in the preceding election campaign or thereafter by high officers of the executive branch.

Conflicts of this sort are doubly incapacitating. They prevent unfettered and vigorous prosecution of those who should be prosecuted. Equally important, they breed public distrust of decisions not to prosecute that may be entirely justified on their merits, and would be accepted as such if made by a prosecutor free from any conflict of interest.

Some argue that if men of integrity held the office of Attorney General, then no other remedy would be needed. I do not think that integrity is enough. In other situations where men of integrity find they have an apparent conflict of interest, we all agree that their duty is to disqualify themselves and have someone else do the job, even though they may be men of such high character that they are capable of overcoming the conflict and discharging their responsibilities conscientiously.

There are men who are capable of doing that, as we all know. But there are also men who are not capable. The appearance of conflict is as dangerous to public confidence in the administration of justice as true conflict itself. Justice must not only be done; justice must also be seen to be done.

If the Attorney General owns a few shares of stock in IBM or AT&T, he routinely disqualifies himself from participating in a government antitrust suit involving that company. If a judge owns a few shares of stock, the Judicial Code of Ethics requires him to recuse himself from the case.⁶ That is not because the Attorney

mer Counsel to the President, accompanied by Zoe Baird).

⁶ ABA CODE OF JUDICIAL CONDUCT, CANON 3 (1980).

General or the judge is not capable of acting impartially notwithstanding his minor financial interest, but because the appearance of conflict must be avoided in order to assure public confidence in our system of justice. Political conflicts of interest clearly fall into the same category. If anything, they are more acute. Public suspicion that a law officer will act in accordance with his political self-interest is even higher than public suspicion that he will act in accordance with his financial self-interest.

There are, of course, other dangers that arise when we entrust prosecutorial discretion to some one outside the normal channels, particularly a one-time prosecutor in a highly visible case, who may have his own political ambitions and be more tempted to ride the horse of a successful prosecution than to return to obscurity by deciding that there is no basis to prosecute. My personal view is that this risk and the other costs of creating a separate special prosecutorial machinery outside the Department could be eliminated by entrusting the special prosecutor function to a nonpolitical head of the Department's Criminal Division or some other nonpolitical official in the Department who is appointed by the President and confirmed by the Senate. If the Attorney General and the Deputy Attorney General disqualify themselves, and if the head of the Criminal Division is indeed apolitical or nonpolitical, his exercise of prosecutorial discretion ought to command public trust.

So long as the final prosecutorial discretion is exercised by someone who is not conflicted, it is not critical whether that person is inside or outside the Department of Justice. What is critical is that the Attorney General and any one else in the Department or the White House with an apparent political conflict of interest must disqualify himself, and that the final decision on whether or not to prosecute must be made by someone who has no such conflict. When the Justice Department, in its Bert Lance investigation, had to look into the transactions between Mr. Lance's bank and President Carter's peanut warehouse—a situation not technically covered by the Special Prosecutor Statute—Attorney General Griffin Bell wisely decided to recuse himself and to appoint a special counsel from outside the Department who functioned as a nonstat-

utory special prosecutor. When the special counsel found nothing to warrant the prosecution of anyone, the public readily accepted this judgment, just as it accepted the decisions of statutory special prosecutors not to present charges against Hamilton Jordan or Tim Kraft. But when the Billy Carter case arose—and the Special Prosecutor statute does not cover private citizens who are close relatives of the President—the Department of Justice handled the matter itself under the ultimate direction of the Attorney General. As you know, the Attorney General's participation became a source of political and public controversy. Although I am convinced that his actions were completely conscientious and objective, the apparent conflict of interest could not be erased from the public mind. It would have been far better if the Special Prosecutor statute had covered charges involving the President's close relatives, and a Senate committee has recently proposed such an amendment.⁷ And since no such provision existed when the Bily Carter case arose, it might have been better to follow the peanut warehouse precedent or to vest final prosecutorial discretion in the nonpolitical head of the Criminal Division, Professor Philip Heymann of Harvard, who was in office at that time.

II. "REVOLVING DOOR" CONFLICT

The "revolving door" conflict existed before Watergate, and it will continue long after Watergate is largely forgotten. It arises when a private lawyer enters government service and a matter comes before him affecting his former law firm or its clients. It also arises after he leaves the government, if he or his firm becomes involved in a matter that was within his government responsibilities, or that comes before the government department in which he worked.

We have detailed laws and government regulations that deal quite effectively with both aspects of this problem.⁸ Recently, however, we have run into great difficulties in fitting these rules along-

⁷ SUBCOMM. ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF SENATE COMM. ON GOVERNMENT AFFAIRS, 97TH CONG., 1ST SESS., REPORT ON SPECIAL PROSECUTOR PROVISIONS OF ETHICS IN GOVERNMENT ACT OF 1978, at 34-35 (Comm. Print 1981).

⁸ Ethics in Government Act of 1978 § 501(a), 18 U.S.C. § 207 (Supp. III 1979).

side other established principles of professional ethics.

The government laws and regulations dealing with the revolving door apply almost exclusively to the individual who enters and leaves government, not to his former or future colleagues in private or public law practice. Our professional rules of ethics, however, adopt a principle of imputation: whenever an individual is disqualified from acting in a matter, so are his professional colleagues.⁹ If I am disqualified from acting as counsel to the Coca Cola Company, so is everyone else in my law firm, and vice versa.

Obviously, there is no practicable way to enforce this principle within the government. Our firm is fortunate enough to be among IBM's counsel in the pending government antitrust case. If one of our young associates had written a memorandum or reviewed some documents in the IBM case and then went to work in the Antitrust Division, he would plainly be disqualified from working in the Division on the other side of the IBM case. Under the principle of imputation, his disqualification should immediately be attributable to all of his colleagues in the Antitrust Division. But because we value the mobility of young lawyers, no one has suggested that the rule of imputation be applied.

But when the government lawyer passes through the revolving door in the other direction, the principle of imputation has been supported. In the District of Columbia, the Bar Association's Ethics Committee voted several years ago to apply the principle so rigidly that even a judge's law clerk who was hired by a law firm would disqualify the entire firm on any future aspect of any case which had been before the court while the law clerk was there.¹⁰ The early drafts of the new ABA Model Rules of Professional Conduct were almost as rigid.¹¹ Fortunately for all young lawyers and, I might add, for the government as well, the case *against* rigid imputation is beginning to win more supporters. But the battle is not

⁹ ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1980).

¹⁰ Compare Cutler, *Conflict of Interests and the Government Lawyer—New Rule Goes Too Far*, 63 A.B.A. J. 725 (1979) with Freedman, *Conflict of Interests and the Government Lawyer—For a New Rule*, 63 A.B.A. J. 724 (1979).

¹¹ MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.11(e), (f) (Discussion Draft, Jan. 30, 1980).

yet over and the issue deserves further discussion.

The avoidance of conflicts of interest is an important political value in our system of constitutional democratic government, but it is one among many important values, some of which conflict with the others. A second and equally important political value is citizen participation in government, not only as voters or lifetime civil servants but also as occasional members of the government during a primarily private career.

Cincinnatus was a glorious and ancient example, emulated in our own times by such admired lawyer-statesmen as Elihu Root, Charles Evans Hughes, Henry Stimson, Dean Acheson, Cyrus Vance, Warren Christopher, and Griffin Bell and many other members of the Georgia Bar. A corollary is that the lawyer-statesman can best prepare for his ultimate responsibilities in public life not only during his private career but also during prior experience in government itself. Whatever its detriments, there is also this positive value to the revolving door.

There is a second benign aspect to the revolving door—its value as an aid to self-enforcement. As the process of government regulation becomes more complex, those who must comply increasingly need advice from private lawyers on how to observe the letter and spirit of the law. Without transgressing the rules against conflicts of interest, many former government lawyers play an important role in this process as private specialists in their fields of government expertise. If you were to ask the most dedicated career lawyers at the SEC, the IRS, or the Antitrust Division whether their alumni in private practice are helpful or harmful to the agency's efforts to enforce the laws, I wager the answer would be that the great majority are helpful.

A third and equally important political value is excellence in government. All of us want government to attract to its service the most intelligent and public-spirited citizens we produce. Since we also want as many citizens as possible to participate occasionally in government, rather than have a government that consists solely of lifetime officials, we must not make occasional governmental service a positive detriment to the individual's pursuit of a rewarding

public-private career.

If a rigid rule of imputation had been in effect through this century, history would have to be rewritten as follows:

Elihu Root could not have returned to his or any other major firm in 1909 after his service as Secretary of State.

Neither could Charles Evans Hughes in 1916 after his service as an Associate Justice.

Neither could Henry Stimson in 1922 after his service as Secretary of State or in 1945 after his service as Secretary of War.

Neither could Dean Acheson have joined Covington and Burling in 1921 after his service as law clerk to Justice Brandeis, nor could he have rejoined it in 1934 after resigning on principle as Undersecretary of the Treasury, or in 1953 after serving as Secretary of State.

Neither could Cyrus Vance have rejoined his or any other major firm in 1967 after serving as Deputy Secretary of Defense or after completing his recent service as Secretary of State.

Neither could Vance's deputy, Warren Christopher, have joined O'Melveny and Myers in 1950 after his service as law clerk to Justice Douglas, nor could he have rejoined it or any major law firm in 1969 after his later service as Deputy Attorney General, or after his most recent stint as Deputy Secretary of State.

No present young lawyer, after serving a one-year term as a Supreme Court, Court of Appeals, or District Court law clerk, could join any firm that had even a rooting interest for a client in any continuing case that had been before the court while the law clerk was there. Neither could many young lawyers now serving at the IRS, the SEC, or the Antitrust Division join a firm involved in any case or affected by any rulemaking proceeding in which they had participated.

Do we want to pay the heavy political cost of so rigid a rule? If it had existed, Root, Hughes, Stimson, Acheson, Vance, and Christopher probably would not have acquired the valuable early experience in government that helped to qualify them for even higher

public duties. If it were widely adopted now, many of our best young lawyers probably would pass up the opportunity of serving as a judge's law clerk or as a young lawyer in a key governmental agency. Many of our best lawyers now in private practice probably would forego calls to join an incoming administration as counsel or Presidential appointee, because of the harm it would do to the future private intervals of what they had hoped would be a lawyer-statesman's career. Surely the quality of government would have suffered had it lost the lawyer-statesmen of recent history. Surely it will suffer if we lose the lawyer-statesmen of today and tomorrow.

In my view, the answer to this dilemma is the same as in the case of the hypothetical young private lawyer in our firm who worked on the IBM antitrust case and then entered the Antitrust Division. We must avoid apparent conflicts of interests. We can do so by walling him off and leaving the handling of the IBM case to his new government colleagues. In the case of the government lawyer who exits from the revolving door and is disqualified as to a particular matter, we can wall him off in the same way. He would be forbidden to advise the client or consult his colleagues on the matter; he would neither receive nor transmit any confidential information and he would not participate in any fee. The unconflicted lawyers in the firm would be free to proceed just as unconflicted lawyers in the Department of Justice or special prosecutors would be free to proceed. The walling off arrangements would be reported to the government and the bar associations. This is what the latest draft of the ABA Model Rules of Professional Conduct now provides.¹² Assuming that the public will trust lawyers at all, it should be willing to trust the integrity of such a course.

I would add one word of caution. There are some circumstances in which walling off will be a mere fig leaf that will not cover a true or apparent conflict. Walling off prevents the appearance of conflict when the matter or the client came to the law firm before the arrival of the former government lawyer or thereafter in a manner

¹² MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.11(c) (Proposed Final Draft, May 30, 1981).

unrelated to the arrival of that lawyer. But walling off may be insufficient when a new matter for a new client comes to the former government lawyer because of his past relationship with some government agency, and he says, "I cannot handle it before my former colleagues at the agency, but my partners can." If we want to preserve public trust, we would do well to avoid such transparent arrangements.

III. CORPORATE CONFLICTS

Another offshoot of Watergate was the corporate payments scandal that came to light when the special prosecutors looked into the secret corporate campaign contributions that featured the 1972 elections. In running down these leads, they stumbled upon a much larger vein of international business bribery with worldwide ramifications, and with serious ethical implications for all lawyers who advise corporate clients.

Not many people are aware of the link between these events or its significance.¹³ When the Nixon men began to finance his reelection campaign, they naturally turned to the business community. Maurice Stans and Herbert Kalmbach, sailing under White House orders, asked dozens of business executives for \$100,000 apiece—much more than in prior campaigns. They did not suggest six-figure numbers merely to the Rockefellers and Mellons and Pews, but also to the professional managers of modest origins who had made the grade as company presidents but had little capital of their own. The amounts they proposed were related to the size of the company and what the Nixon Administration had done and could do for it. They also represented that money contributed before April 1, 1972, the effective date of some disclosure amendments to the campaign financing law, would not have to be reported. Traceless cash was of course acceptable.

Although most business leaders declined to put up such large sums, a number succumbed. They were tempted by the chance to do so in secret, and fearful of the consequences if they refused

¹³ These events are described in greater detail in Cutler, *Watergate, International Style*, FOREIGN POL'Y No. 24, at 160 (Fall 1976).

while their competitors were coming through. Since they could not afford to use their personal funds, they looked for a company source of cash for a payment which was intended for the company's benefit. They knew that using corporate funds was illegal, but they did not expect to be found out.

One of the most convenient ways to generate corporate cash was with the help of a foreign sales agent or consultant who banked in a place like Switzerland where the tax and exchange restrictions were loose. Sometimes the agent used was a foreign subsidiary of the firm itself. The agent would submit an outside invoice which was paid by check so that the records were clean, and, on a later visit to the United States, would return an agreed part of the proceeds in cash. The cash would then go into a "black" or off-the-books account concealed from the auditors, and could be used for any business purpose without being recorded.

A modest number of the Nixon \$100,000 contributors employed this method without informing their boards or their auditors. We might never have known, but for Common Cause and its lawyers. They decided on a court challenge to the Stans theory that contributions made before the April 1, 1972 effective date of the new reporting law did not have to be reported, and they won.

By that time, Watergate Special Prosecutor Archibald Cox was in business. When the Nixon Finance Committee had to report the contributions in the names of the business executives who had been solicited, those who had used corporate funds could not prove that the contributions had been personal. Before long, more than twenty major corporations and their officers had entered Cox's confessional booth.

At that point, the SEC entered the game. While the amounts were too trivial to be material to the business of the firms involved, the participation of top management was germane to their honesty and integrity, and to stockholder decisions on their reelection as directors. The SEC therefore required disclosure to shareholders, coupled with commitments to investigate whether any other illegal contributions had been made. Since a good part of this campaign cash had been generated by overpayments to foreign agents, the

SEC required that all agents' accounts be examined to check whether cash had been returned to the United States. In an inspired moment, Stanley Sporkin of the SEC enforcement staff also insisted that the agents' accounts be checked for "other improper payments."

By intuition or accident, Sporkin had hit the jackpot. Outside directors, outside auditors, and outside counsel took on the task of making the independent investigations. They found that in about half the cases, the foreign agents of the same companies had indeed made "other improper payments"—millions of dollars paid directly or through middlemen to foreign government officials, foreign political parties, and purchasing agents for state enterprises, many of whom solicited harder and had more to deliver than Stans.

Outside directors and auditors of companies that had resisted the Nixon levies also began to inquire whether their own firms had made similar foreign payments. By mid-year, 100 American firms (including about ten percent of the Fortune 500) had disclosed questionable payments totalling more than \$100 million over a five-year period. In a minority of these cases, someone in top management—sometimes including the lawyers—had known or approved of the payments. In some, U.S. government officials had advised or even encouraged the firms to make them.

In some ways, the corporate payment scandal proved to be a bonanza for the lawyers. There were countless internal investigations, SEC proceedings, and shareholder suits. Regular corporate counsel could not conduct "independent" investigations, and other law firms had to be hired for this purpose. As corporate officers came under suspicion, they were also entitled to separate legal representation at corporate expense. New corporate policy standards had to be written and new policing systems had to be devised. Now that these procedures are working and the volume of investigations and litigation is down to a trickle, the corporate bar probably looks back on this particular fallout from Watergate with nostalgia.

But these scandals had another impact on lawyers. They uncovered not only illicit and sometimes illegal corporate behavior, but

also a good deal of legal laxness and ethical blindness among corporate lawyers. They had failed to devise procedures that would have detected and prevented many of the payments that occurred. There were also many corporate lawyers who became co-opted by the profit center mentality of the corporation or the corporate division to which they were assigned, and who—not intending to line their own pockets but trying to help the corporation—actually participated in drafting false papers that cloaked these illicit payments with a cover of propriety.

The dilemma of the corporate lawyer is indeed a painful one. If he is inside counsel, he is part of the management team of a profitmaking entity. He reports to the chief executive officer and his peers are the other senior officers of the corporation. His personal loyalties and affections flow to his colleagues in the management team, just as a private lawyer's loyalties and affections flow to his partners.

The relationships between the private law firm and its corporate client are not very different. While the firm lawyers operate at somewhat more distance, their friendships and loyalties—not to mention their financial interests—tie them closely to the corporate officers.

All these relationships come into play when a corporate officer consults a corporate lawyer about the propriety of a proposed transaction or about a completed transaction in which the officer was involved. In the case of the proposed transaction, the ethical duties of the lawyer are clear, and are usually observed. In the case of the completed transaction, the problem is much more difficult.

Although the lawyer's relationships are with the corporate officers, his client is the corporation. But who is the corporation? Is it the officers? The directors? The shareholders? Or is it the legal amalgam of them all? If the officer consults with a lawyer about the propriety of a transaction the officer has already completed, must the lawyer stop him with a *Miranda* warning? Should he recommend separate counsel for the officer? If the officer makes an incriminating disclosure before the warning is given, should the lawyer report it to a higher officer or, if the chief executive officer

is involved, to the board? If the board does nothing, should he disclose it to the shareholders, which usually means disclosure to the general public and the government as well? If he makes any of these disclosures, how are they to be reconciled with his duty to preserve his client's confidence?

The proposed new ABA Model Rules of Professional Conduct face squarely up to these questions. They say flatly that the lawyer represents the corporation as distinct from its directors, officers, employees, or shareholders.¹⁴ If the lawyer learns that a corporate official or employee intends to violate a public law or a duty to the corporation, the new rules say he has a duty to take the steps reasonably necessary to stop it.¹⁵ These steps may include obtaining a separate outside legal opinion, referring the matter to a higher authority in the corporation, and if the highest authority (the board of directors) takes no action, disclosing the information publicly to shareholders.¹⁶ He may disclose publicly only if the proposed actions amounts to self-dealing for the official's personal benefit and if the lawyer believes disclosure is necessary in the best interests of the corporation.¹⁷ He is also required to give *Miranda* warnings¹⁸ and to refrain from advising corporate officials personally, in addition to the corporation, except with the corporation's consent given by an appropriate and different official.¹⁹ Finally, and most important, the lawyer may withdraw from representation if the corporation's highest authority persists in a course of action that the lawyer believes to be criminal or fraudulent.²⁰

These are clear-cut provisions, not quite as laconic as the ten commandments, but certainly as draconian as the most reform-minded critic of corporate behavior might require.

You will note that the provision authorizing the lawyer to disclose conduct that violates a public law or a legal duty to the cor-

¹⁴ *Id.*, Rule 1.13(a).

¹⁵ *Id.*, Rule 1.13(b).

¹⁶ *Id.*, Rule 1.13(b)(2), (b)(3), (c).

¹⁷ *Id.*, Rule 1.13(c)(1), (c)(2).

¹⁸ *See id.*, Rule 1.13(d).

¹⁹ *Id.*, Rule 1.13(e).

²⁰ *Id.*, Rule 1.16(b).

poration is now limited to the situation where the conduct involves self-dealing and the corporate board of directors has been advised and refuses to take corrective action. In earlier drafts, disclosure was authorized in other cases as well, such as violations of the anti-trust laws or environmental regulations or the disclosure requirements of the securities laws. The change was made because some of us urged that, in such cases, the duty to preserve client confidences may well outweigh any ethical duty of a lawyer to inform against his client.

The ethics of informing have always been troublesome. Under existing ethical principles, if a client advises a lawyer that he has committed a crime, the lawyer may not inform against him.²¹ But if the client seeks the lawyer's advice about an intended crime and intends to commit it despite the lawyer's advice, the lawyer does have a duty to inform.²² This sound and longstanding principle, however, was framed when crimes were personal and violent, long before we invented the hundreds of technical and continuing white collar crimes that are the sanctions for carrying on business in violation of the multiple rules and regulations that now govern business activity. Whether a proposed or continuing course of business conduct is or is not a business crime will often be a close factual or legal question, on which the lawyer may not be able to give a categorical opinion. For the rare corporate management which declines to follow its lawyer's advice against a risky course of conduct, the remedy of informing seems to me excessive. If frequently invoked, it will persuade corporate officials not to seek legal advice on close questions—certainly an undesirable result. To me, a much better remedy for this rare case is the lawyer's privilege to resign. A board of directors which is inclined to disregard its lawyer's advice will certainly think again if the lawyer makes clear his intention to resign.

IV. THE ULTIMATE CONFLICT

There is also an ultimate conflict we have failed to manage very well. I referred earlier to the earnings of lawyers and our large

²¹ See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B) (1980).

²² *Id.*, DR 4-101(C)(3).

share of GNP. We have a duty to serve all who need legal assistance. We also have the normal human desire to live well, to raise and educate our families, and to enjoy the amenities of life. We devote most of our time to serving those who can pay us the most. We are uncomfortable with this situation. We expiate it by periods of public service and by a very substantial amount of what we now call pro bono service to the disadvantaged. In our firm we try to commit five percent of our time to such work, and I have favored an ethical rule making some such percentage mandatory.²³ The rich who pay our fees are less than one percent of our fellow citizens, but they get at least ninety-five percent of our time. The disadvantaged we serve for nothing are perhaps twenty to twenty-five percent of the population and get at most five percent of our time. The remaining seventy-five percent cannot afford to consult us and get virtually none of our time. Virtually all of this seventy-five percent consult a doctor when they need medical assistance. What percentage do you think consult a lawyer when they need legal assistance? Would not most of them do so if they could afford it? Of course they would.

How much thought have we given to figuring out ways in which the great majority could afford the legal services we lawyers have a duty to provide? Through the combined efforts of the government, the medical profession, and the business and financial community, assisted by the ingenuity of lawyers, we have figured out how to bring health service within the reach of all. We have done this by supplementing the fee for service system with public and private insurance systems and systems of prepaid care like the Kaiser-Permanente Plan—the prototype of the Modern Health Maintenance Organization or HMO.

Why can't a similar effort be mounted for legal services? The HMO's and the private insurance firms are profitable both for the doctors and the organizations as a whole. The same economics ought to work for legal service enterprises.

As a starter, why can't our best law firms arrange with their major business clients to provide legal services to all employees who

²³ Cutler, *Be Pros, Not Partisans*, JURIS DOCTOR 40 (Oct. 1976).

desire them, as a fringe benefit paid partly by the business firm and partly by the employee, perhaps with a minimal fixed fee to be paid by the employee for each consultation to discourage excessive use? This is exactly how the Kaiser-Permanente HMO system got its start.

Why don't we experiment in devising ways to serve this unserved seventy-five percent more effectively, instead of merging and opening branch offices in further pursuit of those who pay us the most, until like the accounting firms, we all fall into the black hole of a Big Eight? What better way than serving this unserved seventy-five percent, and thus providing responsibility and experience for our young recruits, and the opportunities that come from growth? What better way to answer President Giamatti's question, and to convince our uneasy fellow citizens that lawyers do something for the rest of us that justifies our large number, our high rewards, and the pursuit of legal careers by the ablest young citizens we produce.

Senator MATHIAS. The next witness is Ann McBride, senior vice president of Common Cause. I would remind you of our 5-minute rule.

STATEMENT OF ANN McBRIDE, SENIOR VICE PRESIDENT,
COMMON CAUSE

Ms. McBRIDE. Thank you very much, Mr. Chairman. I have a written statement which I prepared recently for a House Judiciary Committee hearing on this same subject that I would like included in the record.

Senator MATHIAS. Without objection, it will be included in the record.

Ms. McBRIDE. We appreciate so much the leadership of Senator Thurmond and others on this committee who are pressing forward with legislative remedies to what has been clearly demonstrated as a serious and growing problem.

Very often you hear about ethical abuses, you hear about conflict of interest, and there is a great outcry and the wringing of hands and nothing is done to try and remedy problems for the future. That is why I think what this committee is doing is so important—putting forward legislative proposals and not just introducing them and letting them sit on the calendar but actually pushing forward for action. So we appreciate this and appreciate the opportunity to testify here today.

You know, maybe I have been around Capitol Hill too long, but this morning when I hear those departments coming in, and telling us everything is fine, there is no need for change, that this new legislation will hurt recruitment, people will leave Government in droves, it will prevent employment. I am reminded that this is exactly the same kind of thing that many of these same agencies said before the passage of the 1978 Ethics in Government Act—that it would hurt recruitment, et cetera, et cetera.

The Ethics in Government Act law passed, the horrors did not materialize, and now they come forward again, although it is certainly different people, saying the same kind of thing.

I want to take a minute to talk about the recruitment problem because I really think it underlies a lot of the discussion here. That recruitment has got to be considered is obvious. But I submit that strong, clear, ethical standards will help recruitment, not hurt it. We believe it will restore the lustre of public service and it will help retain the hard-working, honest employees who are very concerned and demoralized about the declining view of the American people in Government. It will help retain those honest employees who are demoralized when they see their former colleagues coming back and immediately using influence, access and information to lobby the Government.

Frankly, I think nothing is as demoralizing to our democracy as the loss of integrity in Government. Nothing is more discouraging to honest Government employees and American taxpayers than the spectacle of public officials cashing in on their positions of public trust. The *Michael Deaver* case has become a symbol for all of this, but it is only the tip of the iceberg and there are many other examples. Certainly the newspapers have been full of examples, long

lists of high-level people who have left Government positions to go out and come back and lobby the Government.

We did a study also, Mr. Chairman, in 1984 talking to ethics officials throughout the agencies, the designated Agency ethics officials responsible for ethics implementation—and an overwhelming majority of them—and again, they are dealing within the agencies—cited post-employment conflict of interest as an important ethics problem. These are the people responsible for ethics on a day-to-day basis in the agencies.

We believe that it really is incumbent upon Congress now to act to strengthen the ethics laws. I have not seen the famed new bill. I have heard about it. I know the outlines of it, and in my view it makes significant, important steps toward remedying what I think are some legitimate criticisms of the first bill. It has been narrowed, it is my understanding, significantly, while still going at the basic core problems. We believe, from what we hear about it—and we, of course, would like more time to look at it—we think that it is very good and the general approach should be accepted.

Let me just touch on three of the points in the bill. First, we believe that the 1-year ban needs to be strengthened. As you know, current law only prohibits lobbying the specific Agency at which one was employed after leaving Government. Circumstances have shown that this is too narrow, particularly—and this is important—for the upper-level officials.

Again, if you look at what the Office of Government Ethics has done with that 1-year ban, you find, for instance, that the Executive Office of the President, as we have all read about, has been divided into nine separate agencies; therefore, Michael Deaver claims he is within the law to lobby OMB because the White House has been set apart.

Now, this is not a meaningful ban. It needs to be strengthened and we believe again for the higher level people there should be a governmentwide ban for 1 year from lobbying the entire Government. Again, we appreciate that the bill applies to all three branches of Government. Clearly, Members of Congress should meet the same kind of standard.

I also want to point out that establishing a GS level for covering people is what is used in the financial disclosure requirements under the current bill.

Finally, we believe that there should be a ban for high level officials on going out and lobbying for a foreign government for a significant period of time. We also are very pleased that the lifetime ban that was in the earlier law has been reduced. But we do believe for those very high-level people who have access to information, knowledge, and contacts, the ban should be significant.

Finally, we want to add our voice to those who believe very strongly that there should be penalties as well as criminal penalties under this bill. We think that would be a very big improvement. We also believe that the bill should retain the 2-year ban that is in the current law.

Finally, in conclusion, I think that we really are faced with an important question today and that is whether public service continues to be a public trust or whether Government is viewed simply as a way station for using public office for personal financial gain.

Thank you very much.

Senator MATHIAS. Let me ask you three very quick questions. One is the same question I just asked the last panel. Do you think there should be further disclosure laws? Do you think that the mere fact that a lobbyist says he spent \$49.92 on lunch is enough, or do you think he should identify who ate the lunch and what they discussed over the lunch table?

Ms. McBRIDE. Well, Mr. Chairman, again I go back a while and you and I had some disagreements about disclosure, lobby disclosure legislation in past years. We believe that there should be increased disclosure of lobbying. We do not think it is enough. We do believe that there should be increased disclosure.

We have had a lot of difficulty getting increased lobby disclosure of those lobbying Members of Congress. I think the lobby disclosure bill was the only legislation that united every lobbyist in town, and it was a pretty powerful opposition. I think there should be increased disclosure, but I think we also need bans as are embodied in this legislation.

Senator MATHIAS. What about criminalizing a Common Cause member who happened to be a former member of my staff who wrote to me and said vote for the Thurmond bill?

Ms. McBRIDE. Well, first of all, we think the bans should work again for a limited period of time.

Senator MATHIAS. Well—

Ms. McBRIDE. Second, we also believe—

Senator MATHIAS. One day, but in this case it is a substantial period of time. There is a principle at stake here. The Common Cause member who believes the bill ought to be adopted, but who happens to have been a former member of my staff, writes to me within the prohibited period of time, should he be criminalized?

Ms. McBRIDE. Well, first of all, Mr. Chairman, my understanding and our view was that this communication should be banned if it is done for compensation and—

Senator MATHIAS. That is not what the bill says.

Ms. McBRIDE. Well, the question of compensation is one that should be looked at from our point of view. But—

Senator MATHIAS. You would only prohibit it if it involved compensation?

Ms. McBRIDE. That is a concept that I think needs to be looked at.

Senator MATHIAS. That is not the way it is today.

My third question is—

Senator BIDEN. Excuse me—

Ms. McBRIDE. Again, I have not seen the new bill. I do not know—

Senator BIDEN. I think it is a good question. How about if it is a Common Cause staff member—staff members get paid, right?

Ms. McBRIDE. Yes, I hope so.

Senator BIDEN. No, I am not being smart.

Senator MATHIAS. I think you are right. In pursuit of their duties as a member of the staff of Common Cause, they would be criminalized.

Ms. McBRIDE. Under this bill, if I had been in Government and left, I absolutely believe that I should not be coming back here, if I

were your staff member or your staff member and had that whole network of people that staff people do throughout the Hill, and knew people who dealt on these issues, I should absolutely be banned from lobbying for a period of time and I think also—

Senator MATHIAS. I am talking about a member of my personal staff—

Ms. McBRIDE. Right.

Senator MATHIAS [continuing]. Who writes a personal letter to me, period. That would be criminalized under this bill.

Ms. McBRIDE. Again, Mr. Chairman, I go back. From my perspective, if that is being done for compensation it absolutely should be banned and—

Senator MATHIAS. My final question is what public interest is served if you have a high-level official, say a Cabinet officer who undertakes a study of whether a given product meets the standards of the World Health Organization and you prohibit him from doing that because the study is commissioned by a company which is 51 percent owned by foreign interests, what national interest is served by that?

Ms. McBRIDE. Again, Mr. Chairman, our focus has been on the foreign governments and the representation of foreign entities—

Senator MATHIAS. That is what would happen under this bill.

Ms. McBRIDE. The foreign entity question is one, the ability to use inside information, et cetera, particularly for the higher level people, we think—

Senator MATHIAS. This is no inside information. This is the World Health Organization, this is their standards, this just happens to be a company that is at least 51 percent owned by foreign interests and you are criminalizing that act under this bill.

Ms. McBRIDE. Again, I think that the bans with a reasonable length of time a person can do it, maybe not at that particular time, but can do it later in his public service and it is not a lifetime ban. I think a lot of the examples you are giving—you know, obviously they are some of the tougher examples, but in fact—

Senator MATHIAS. But that is a real-life case. That is an actual case.

Ms. McBRIDE. But in fact this person would be able at a point in his or her career to do this, not immediately after leaving government.

Senator MATHIAS. Ten years later?

Ms. McBRIDE. If they were those very top 30 people or whatever it is, in my view the 10-year ban is fair and—

Senator MATHIAS. Even for a study of the World Health Organization's food standards, that is necessary to the national interests of the United States?

Ms. McBRIDE. Again, let me say that, as I said at the outset and said in my testimony, we think the greatest problem is foreign governments and representing foreign governments, that that is the core major problem. In questions of foreign entities, I think some very strong cases have been made for bans applying to them, when you get into trade issues and others.

But our primary focus has been on lobbying for foreign governments, that we think that the foreign entities part that is included

also is important to look at, but it has not been frankly our primary focus in this bill.

Senator MATHIAS. Thank you.

Senator BIDEN. I think your statement was the best statement I have heard in terms of expressing the concern and, in some cases, the outrage of Americans about what they perceive to be happening. But I think from the questions you can see that it's necessary—and I know you will get a chance because you do it well—to look at some of the modifications in the bill and look more closely at some of the provisions of the bill, because I think there are some real, serious problems.

For example, I assume that Common Cause, having worked with you all so long, is not unlike the NAACP or the Legal Defense Fund or any others. You all go out and you look for former staff people; the people you most want to hire for paid jobs are people back here, unless I am mistaken. Am I correct about that?

Ms. McBRIDE. Sure.

Senator BIDEN. And the reason you do is you want access and knowledge. I am not suggesting that it is bad. I just want to make sure we are all talking about the same thing here. I mean the reason why—first of all, am I correct about that? Why would you look for former staff people for Common Cause, for example?

Ms. McBRIDE. Well, we would look for former staff people because of their information and skills and because they know people.

Senator BIDEN. They have access to Senators, too, right?

Ms. McBRIDE. Well, let me just—before you go further with this, let me point out that under the Senate Code of Conduct there is a 1-year ban on going back to lobby your Senator, or if a member of this committee staff, the Senate Judiciary Committee staff were to leave, he or she cannot come back for 1 year and lobby members of this committee. So this is a concept, the fact that there should be a cooling off period is embodied in the Senate code of conduct but it does not mean that they cannot later, 2 years, 3 years later come back and lobby you.

Senator BIDEN. I was being accusatory.

Ms. McBRIDE. No. I just—

Senator BIDEN. I just wanted to make sure you—

Senator MATHIAS [continuing]. If you would yield for a moment—

Senator BIDEN. I yield.

Senator MATHIAS [continuing]. I think that is an excellent point and that is the law, why do we need to do it again. We have done it.

Ms. McBRIDE. The view is, No. 1, that for the very top-level people, again, for the top-level people there is exactly the problem that Senator Biden is raising. A Judiciary Committee staff person who works for you also knows everyone in the Maryland delegation, has also worked very closely with the Justice Department, has also worked very closely with people all over this Government if they are good staff people. And in our view, for the top-level people there should be a 1-year ban on contacting any part of the Government, not simply the particular Senator or the committee for which that staff person works.

Senator MATHIAS. Thank you very much.

Ms. MCBRIDE. Thank you.

Senator MATHIAS. Our final panel today is Mr. Norman J. Ornstein, political scientist, of the American Enterprise Institute; Carol Bonosaro, executive director of the Senior Executive Association; and Mort Halperin and Jerry Berman, of the American Civil Liberties Union.

Ladies and gentlemen, we are sorry that we have gotten so late, but you are experienced witnesses before this committee and I am sure you can do it in record time.

While you are organizing, let me put into the record a statement by Senator Denton which should be made part of the record.

STATEMENT OF NORMAN J. ORNSTEIN, POLITICAL SCIENTIST, AMERICAN ENTERPRISE INSTITUTE; CAROL A. BONOSARO, EXECUTIVE DIRECTOR, SENIOR EXECUTIVES ASSOCIATION; AND MORTON H. HALPERIN, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION, ACCOMPANIED BY JERRY J. BERMAN, CHIEF LEGISLATIVE COUNSEL

Senator MATHIAS. Who would like to begin.

Mr. ORNSTEIN. There are a couple of issues that I would like to address, particularly when Senator Biden gets back. One has to do with the question of whether Congress should be legislating simply to allay concerns out in the citizenry and to restore confidence among citizens, or whether in fact Congress should be legislating to deal with the real problem, and we have some real questions as to whether those two are identical. In this case, I do not think they are.

In our experience over the decades with ethics questions and ethics laws, it is that when we change the ethics laws we do not necessarily, in fact usually do not at all have a positive effect on public confidence. Often it is exactly the opposite. You change the ethics law and the public says, ah-huh, we knew you were unethical in the first place, so we have got a real question there.

In this case, I think the broader question, which is usually the question in ethical matters, is a balancing test: Do the positive aspects of this law and the change in the law that is taking place outweigh the negative aspects and the negative consequences? I have very, very serious problems with this particular change. It is a question we always have to ask with changes in ethics laws.

It is my view that these changes by and large would create far more negative consequences in terms of public service at all levels than they would positive effects in terms of deterring the kind of unethical behavior that we are trying to deter, and I believe that that is the case with top-level officials as well. A 10-year ban does not address the problem any more than a lifetime ban did.

If we are talking about a Secretary of State, we are talking about somebody who almost certainly, given the small number of people in this country, the pool that any of us would particularly find worthwhile to be considered for Secretary of State, probably would include individuals in their midfifties on up. You are talking about somebody who served for, say, 4 or 5 years, would leave Government at the age of 60 and would then go back and would have a 10-

year ban from representing or working for any foreign entity, not just lobbying, until the age of 70 or thereafter. That is in effect a lifetime ban and it does not deal with the problem, at least as I would see it.

I think that there are things that could be done and there are things that ought to be done. We have to start with the test of whether the problem is in fact in the existing law, the question that Senator Thurmond asked: If the existing law is so good, why do we have violations of it. You could ask the same thing any time a murder is committed or any time any other violation of a law takes place. There are some problems in the existing law, but the primary problem in my view is the enforcement of the existing law.

The problem has been that the Justice Department has simply not seen fit to enforce this particular law, and I believe that there is also an attitude that has existed in some parts of the executive branch that these laws are not particularly worth enforcing.

We have seen with the Deaver case one particular glaring problem that I think is easily fixed in the existing law, and that is the question of the definition of agency. I think it is very easy to simply define the White House to include all aspects of the Executive Office of the President, and you deal with that particular problem.

More broadly than that, I think I can see some areas where change would be desirable, and as we go about this process let me just offer a few suggestions. The first is going back to the Ethics in Government Act and modifying it to alter the role of the Office of Government Ethics.

I think there has been a public perception, which is quite probably an accurate perception, that the Office of Government Ethics has been lax in its concern about ethical standards and is perhaps in the public perception at least too closely tied to the White House. The head of the Office of Government Ethics is appointed by the President and there is at least the perception that that individual is going to be sensitive to the White House and officials within the White House. I do not think it is a bad idea to consider changing the Office of Government Ethics, changing its role and changing its position, and perhaps to create a much more independent Office of Government Ethics with an independent head and with independent inspectors, maybe along the lines that we now have the Merit Systems Protection Board, at least with the independent investigators within that office, or perhaps even to consider creating a Government-wide inspector general who would have authority over ethical questions and who would not be in any way tied to the existing administration.

We have now gone for almost 50 years with this act, it is time to take another look to define that more broadly. We could have the registrations published in the Congressional Record as lobbying registrations are published in the Congressional Record. They will be reprinted in Congressional Quarterly and will have a much wider public dissemination of who in fact is representing foreign entities. Disclosure can serve as a deterrent in this case.

And I can see, responding to one of the questions you raised, Senator Mathias, going back to the 1946 Lobbying Act and rethinking some questions there. I am not sure I want really much more de-

tailed evidence there, but there are some loopholes there. There are some legitimate questions about who is required to register.

Lobbying of the executive branch is not included in the 1946 Lobbying Act, and the question of whether you register once or register every quarter or register on a more regular basis.

We can do a number of things that would improve the lobbying laws without turning to draconian penalties that I think create a problem. I believe that there is a serious problem of public service in this country. There is a problem getting good people to come and serve in Government at all levels, including the top levels. There is a problem retaining them in the Government.

I think that to suggest that the bill as it has been proposed and including the amendments is overkill in this case and would turn this problem into a crisis is almost an understatement.

As you know, Senator Mathias, the Brookings Institution, the American Enterprise Institute, and other organizations are trying to work on the problem of getting people to serve in Government. I think this creates a serious problem. If this bill passed as it is drafted, including the amendments, I cannot imagine an individual who would serve as Secretary of State. George Shultz could not go back and work for the Bechtel Corp. Cy Vance could not go back and practice international law. Almost anything that you can do other than serve with an academic institution would almost be precluded. It is one thing to limit lobbying—

Senator BIDEN. You had me up to that point. Any American who will not serve as Secretary of State is—I mean—all of those people would give their left arm to serve. It is like saying if you ever became President, you could never again be a lawyer. You would not have any problem having people lined up to be President.

Senator MATHIAS. There is a little difference there. A President is very handsomely taken care of for the rest of his life. An ex-Secretary of State who does not happen to have any resources is different.

Senator BIDEN. What Secretary of State—

Mr. ORNSTEIN. You gave an example, Senator Biden. Take Cy Vance. Just imagine the next administration coming in, the next President trying to go out there and get people. You have got somebody who has spent the lion's share of his professional career practicing international law. Now, a lot of that may involve simple commercial questions, but he is practicing international law, and you are suggesting come in and be Secretary of State, sure, it will be wonderful, you will do that for 3 or 4 years, the average tenure is much less than 4 years, and then practically speaking the area where you had spent the lion's share of your professional career is precluded. Do you not think that would make him think twice at least before doing that, much less Assistant Secretary of State?

Senator BIDEN. Well, there I agree. I am saying if you talk about Secretary of State, there is no office in the United States, including the U.S. Senate, including anything other than being on the Supreme Court of the United States of America, that more women and men of calibre and competence in this country would covet. I might point out that seldom have we ever asked anybody to become Secretary of State who has not already put himself or herself—with the notable exception of Senator Muskie, having come

from the Senate—in a position where financial capability was something they did not have to worry about when they left the office.

I agree with everything you said up to that point. I mean it is just sort of——

Mr. ORNSTEIN. I am willing to make a concession. Make it just the Secretary of State and keep all those other high officials out.

Senator MATHIAS. Let me say, Mr. Ornstein's time has long since expired, but——

Senator BIDEN. Because I have taken most of it.

Senator MATHIAS. You wanted to make one point when the Senator——

Mr. ORNSTEIN. Just to reiterate a point. I think when you are dealing with questions, serious questions that are there about the confidence that the public has in Government, the responsibility of the Senate is to ask do we legislate in response to questions of the confidence in Government or do we legislate in response to real concerns out there, can we do something that in fact meets both of those while meeting a balancing test, and that is the question about this particular law. And the reality is that whenever we have legislated simply to respond to questions of confidence out there, we end up having exactly the opposite effect.

Senator BIDEN. I think we do both. Thank you.

[The following material was subsequently supplied for the record:]

RESPONSE TO QUESTION FOR NORMAN J. ORNSTEIN, FROM SENATOR SPECTER

Question. Since the last hearing was held on S. 2334, I understand that the proposed lifelong prohibition against representation of a foreign government by certain top-ranking officials has been reduced to a ten-year ban. Do you think that ten years is adequate time for any potential for "unfair influence" to have dissipated?

Answer. I believe that ten years is more than enough time for "unfair influence" to have dissipated, but I remain unsure about what "unfair" influence is. In my opinion, the ten year ban against representation by high officials of any foreign entity—commercial or governmental—is to keep high officials from passing any secret or privileged information to these foreign entities. I think the ten year ban is absurd, even if it is better than a life-time ban. For officials such as Secretary of State or Defense, since it is unlikely that any individual would attain such a position before age 55 or so, and thus leave the office at age 60 or so, a ten year ban is an effective lifetime ban. And to prevent a Cyrus Vance or Ed Muskie from practicing international law, or a George Schultz from returning to Bechtel or advising a Third World country on development matters, is overkill. Nobody has demonstrated any abuse of power by top officials of this sort; nobody has demonstrated instances where the basic structure of the Ethics in Government Act has proved inadequate or flawed. There are several reforms that can and should be considered, as my testimony outlines. But blanket ten year bans of this sort are way out of line.

Senator MATHIAS. Ms. Bonosaro.

STATEMENT OF CAROL A. BONOSARO

Ms. BONOSARO. Thank you for the opportunity to be here today and to present the view of the Senior Executives Association. As you may know, we represent all of the career executives who are members of the Senior Executive Service in the Federal Government, and they are responsible for managing day-to-day operations of the Government as well as ensuring their own integrity and the integrity of the employees who they supervise.

We present on an annual basis a seminar on ethics in Government because we do share a concern about that issue and that seminar serves to update our own members on ethics issues which have arisen during the year.

We strongly believe that the legislation before you today represents an overreaction to public outrage over former political officials attempting, according to the media, to misuse their positions immediately after having left Government. We do not know the facts well enough to judge them and those judgments are best left to the Department of Justice and others. However, as we all know, bad facts make bad law.

To enact more stringent laws covering most Government employees merely as a reaction to the abuse of one or two is, we believe, bad law.

One of the current officers of the association has served as a Government ethics official. In nearly every instance where he saw a violation of the postemployment restrictions, those violations were committed by former political officials who inadvertently attempted to represent someone in a matter which had been under that individual's official responsibility, but about which the official knew nothing. When the problem was pointed out, the former official immediately withdrew from representation and took extra steps to ensure that similar errors never occurred again.

Since those violations involved criminal statutes, they were referred to the Department of Justice for investigation. Large inquiries were mounted, the determination would be made that the violations were inadvertent, and the matter would be closed after a tremendous amount of effort. It is not that real violations do not occur, but that for the most part many people try their best to comply with the law.

Because of that attempt to comply with the law, few criminal prosecutions, if any, ever occur. Most people do not want to prosecute and send to jail individuals who inadvertently violate a criminal provision, and we do not believe that the answer is more stringent criminal provisions.

As an alternative, we propose that the current sections of title 18 involving postemployment conflicts be also enacted as civil proscriptions, possibly in title 5 of the United States Code. We propose that they be civil in nature, such that the Department of Justice could seek injunctions against any former employee who violated them and could seek to recover on behalf of the United States any fees that were paid to the former employee who attempted the representation in violation of sections 205 to 208 of the current title 18.

The reason we believe this is a better solution is because the burden of proving the violation would change from beyond a reasonable doubt to a preponderance of the evidence, a civil rather than a criminal standard.

Second, enforcement would be easier and the stigma of marking former officials as criminals would not be present, thus making the decision to proceed against an individual easier for the Department of Justice and making the likelihood of success higher.

Third, the investigation of such violations could in many instances be carried out by the individual agencies, rather than

having to rely on the FBI. Many investigative agencies are extremely overburdened right now and unable to handle the number of investigations necessary and which would result under these amendments.

Fourth, the deterrent effect for former officials is every bit as strong as it is with the current criminal penalties because of the higher likelihood of prosecution and of recovery of the fees paid to them.

We have a final suggestion with regard to employment by a foreign entity—contained in the amendment—which would bar for 2 years any representation by former employees down to and including GS-11's. We believe that should be amended to make the restriction civil in nature and to restrict representation of these foreign entities by Cabinet, sub-Cabinet, and congressional employees for a 2-year period, the presumption being that for these officials the foreign entities issue was under their official responsibility.

We are concerned primarily, as are a number of the other witnesses today, that the enactment of this legislation would effectively bar extremely qualified people from Government service. I would simply like to point out that the difficulties that exist, as you well know, Senator, right now relate not only to pay but also to public image. Now we add restrictions that might be very sweeping in nature. We are seeing far fewer young people aspire to public service today, to take the positions that are open to them. This could serve as the final blow, I think, unless we consider very carefully the nature of the changes being enacted.

Thank you.

[The prepared statement of Ms. Bonosaro follows:]

TESTIMONY OF
THE
SENIOR EXECUTIVES ASSOCIATION

PRESENTED BY
CAROL A. BONOSARO
EXECUTIVE DIRECTOR

Thank you, Mr. Chairman, for the opportunity to be here and to present the views of the Senior Executives Association on S. 2334 and the related amendments.

The Senior Executives Association represents all the career executives who are members of the Senior Executive Service in the Federal government. Our members are responsible for managing the day-to-day operations of the government, and for ensuring the integrity of governmental processes. They do so by monitoring the integrity of the employees that they supervise and manage, and by monitoring their own integrity in relation to the law. As their professional association, we proudly present an annual seminar on ethics in government, providing updates for our members on issues of ethics that have arisen in the past year and how they have been handled by their peers.

In our view, S. 2334 goes too far. Current law, as you know, provides that high level former officials are barred for one year from any contact with their former agency for purposes of representing anyone, provides a two year bar on matters which were under the official's responsibility within the last year of his or her employment, and provides a permanent lifetime bar of the former official representing anyone on any matter in which he or she personally and substantially participated while in government. All of these restrictions are criminal in nature, and provide for heavy prison terms and fines if the former employee is found to have violated them.

S. 2334 and the Thurmond-Simon-Metzenbaum amendment would carry the current restrictions much further. GS-15's and above would be barred from representing anyone before any government agency, including Congress or the courts, for two years; GS-11's to 14's would not be allowed to represent anyone before their former agency for one year; and the representation of foreign entities (whether they be corporations, governments or individuals) would be even more strictly constrained.

We strongly believe that these proposals are over-reactions to the public outrage over former political officials attempting, according to the media, to misuse their positions immediately after having left government. We do not know the facts well enough to be able to make judgments about the allegations, and those are best left to the Department of Justice and others. However, as we all know, bad facts make bad law. To enact more stringent laws covering most government employees merely as a reaction to the abuse of one or two is, we believe, bad law.

Some of the current officers of SEA have served as agency ethics officials. They have informed us that, in nearly every instance where they saw a violation of the post-employment restrictions, those violations were committed by former political officials who inadvertently had attempted to represent someone in a matter which had been under that individual's official responsibility, but about which the official knew nothing. When the problem was pointed out, the former political official immediately withdrew from their representation and took extra steps to ensure that similar mistakes never occurred again. Since these potential violations involved criminal statutes, even though the matter was inadvertent, it was required that they all be reported to the Department of Justice for investigation. Large inquiries would be mounted, the determination would be made that the violations, if they occurred, were inadvertent; and the matter would be closed after a tremendous expenditure of effort. It is not that real violations never occurred, but that, for the most part, everyone tried their best to comply with the law.

Because of the attempt to comply with the law, few criminal prosecutions, if any, ever occur. Most people do not want to prosecute and send to jail individuals who have inadvertently violated a criminal provision which is extremely difficult to monitor and enforce. The current criminal law in 207 Title 18 is such a law, and the proposed changes to 207 in S. 2334 (and the proposed amendments) would make it even worse. We just do not believe that even more stringent criminal laws are the answer to the problem.

As an alternative, we propose that the current sections of Title 18 involving post-employment conflicts be also enacted as civil proscriptions, possibly in Title 5 of the United States Code. We propose that the new proscriptions be civil in nature, such that the Department of Justice could seek injunctions against any former employee who violated them and could seek to recover on behalf of the United States any fees that were paid to the former employee who attempted the representation in violation of 205 - 208 of the current Title 18. The reason we believe this is a much better solution is first, because the burden of proving the violation would change from "beyond a reasonable doubt" to "a preponderance of the evidence," a civil rather than a criminal standard; second, enforcement would be easier and the stigma of marking former officials as criminals would not be present, thus making the decision to proceed against an individual easier for the Department of Justice, and making the likelihood of success much higher; third, the investigation of such violations could in many instances be carried out by the individual agencies, rather than having to rely on the FBI or other criminal investigative agencies, many of whom are extremely overburdened and thus unable to handle the number of investigations necessary under these amendments; fourth, the deterrent effect to former official is every bit as strong as it is with the current criminal penalties because of the higher likelihood of prosecution and of recovery of the fees paid to them.

Finally, we suggest that the employment by a foreign entity provisions contained in the amendment which would bar for two years any representation by former employees down to and including GS-11's, should be amended to make the restrictions civil in nature, and to restrict representation of these foreign entities by Cabinet, sub-cabinet and congressional employees for a two year period. The presumption should be that, for these officials, the foreign entities issue was under their "official responsibility" since they were subject to lobbying or representation on behalf of others representing these foreign entities while in government. Thus, a two year proscription on their representing these entities before government appears reasonable. To go beyond that, again we think is an over-reaction; and, to bar everyone from GS-11 up from providing such representation is extreme. If it is decided that such restriction should extend further down into the civilian career ranks of the government, we suggest that the restriction only apply to those at the State Department, AID and other bureaus or agencies whose employees are commonly dealing with foreign entities during their employment in government.

To enact S. 2334 as proposed, or with the Thurmond-Simon-Metzenbaum amendment, would effectively bar extremely qualified people from government service. Few, if any, individuals who are familiar with the kinds of issues necessary to be dealt with in the international arena (such as those at the Department of Justice, AID, and Commerce) would be willing to accept public service in those departments and agencies under the proposed restrictions. We would lose a whole body of potential government employees who just could not accept the post-employment restrictions that would be imposed by this bill.

In summary, we urge you to modify this proposed legislation to make the penalties civil in nature, and to test the civil penalties for a period prior to expanding the criminal restrictions. Thank you very much for this opportunity to testify. I would be happy to answer any questions you might have.

Senator MATHIAS. Thank you.
Mr. Halperin.

STATEMENT OF MORTON H. HALPERIN

Mr. HALPERIN. Senator Mathias, I would be remiss if I did not begin by noting that your willingness to throw your body in front of this fast-moving and apparently very reputable train is another reminder of how much we will all miss your wisdom and courage after this session of the Congress.

Senator MATHIAS. Thank you.

Mr. HALPERIN. We start with the proposition that what Congress is seeking to control here is first amendment activity, and first amendment activity that benefits not only the speaker but the listeners. Congressional and public debate on foreign policy issues and other issues is greatly enhanced by the active participation of former officials, and it is enhanced by their participation, whether not they get paid.

It is perhaps only law professors who believe that people can do anything they want, even if nobody pays them for it. The rest of us can only do it if we do in fact get paid.

Senator MATHIAS. That is an enormously important point and in some foreign activities, for instance, I can think of a former Solicitor General who is still with us, who was asked to go and work with a constitutional commission in an African republic. Well, how can that do anything other than be good for the United States of America in the long pull?

Mr. HALPERIN. We agree on this, Senator.

I want to say that since the committee had a witness who was asked for an impartial opinion on the constitutionality, that the case he relied on suffers from three defects: First, it is not on point; second, it was wrongly decided; and, third, it has been overruled. [Laughter.]

It is not on point because——

Senator MATHIAS. That is a rather devastating analysis.

Mr. HALPERIN. I would like if I could to ask permission to submit a written analysis of it.

Senator MATHIAS. Without objection, it is so ordered.

Mr. HALPERIN. It is not on point because it is a commercial speech case, and what we are dealing with here is not commercial speech. Commercial speech is speech by business firms about business activities. It would be as if to say that a newspaper which pays its reporters and sells its copies has less first amendment protection than a pamphlet which somebody writes on their own and distributes for free. There is simply no basis in the law for saying because one is paid it becomes commercial speech.

But even if it was commercial speech, the decision has in fact been overruled. I refer the committee to a 1980 Supreme Court decision called *Central Hudson Gas*, which we will discuss in our memorandum, which lays out the standards for regulating commercial speech. They are exactly the same as the standards we suggest in our testimony, that is there has to be a substantial Government interest, the regulation must directly enhance the governmental in-

terest, and it must be no more than necessary to serve that interest.

So even if this was commercial speech, which it is not, the standard under the recent Supreme Court decisions would be exactly the same.

I want to say we do seek to hire and in fact have hired former Government officials, and I think it would be a very serious setback if we were in a position where those people could not lobby, even lobby their own agencies even for a period of a year.

I would urge the committee to leave the current law intact and to amend it insofar as one can identify specific narrow ways in which it should be amended, I think three of those have been suggested.

One is to clarify the question of what it means to have worked on an issue, so that it is not possible to work on an issue and then say that one did not really work on it. Second, is to clarify what the agency is, and the suggestion has already been made, that the Executive Office of the President ought to be clearly made part of the White House—assuming that is in doubt at the present time. Finally, I think there is some merit in saying that certain very senior people work for the Government as a whole and that the prohibition on working for a particular agency ought to apply to those people for whatever the period is, a year, for the entire Government.

But to throw out the whole system and start over with the kind of sweeping regulations which are in even the revised legislation, in our view, is unconstitutional, and is very bad policy and would have a very serious detrimental effect, not only on the ability to recruit people but on the quality of debate on public policy issues.

We thank you again for having this hearing.

[The prepared statement of Mr. Halperin follows:]

STATEMENT OF

MORTON H. HALPERIN, DIRECTOR
WASHINGTON OFFICE

AND

JERRY J. BERMAN, CHIEF LEGISLATIVE COUNSEL

ON BEHALF OF

AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman:

We appreciate the opportunity to appear before you on behalf of the American Civil Liberties Union. As you know the ACLU is a nonpartisan organization of over 250,000 members dedicated to the defense and enhancement of civil liberties guaranteed by the Bill of Rights.

We start with the assertion that the lobbying activity to be regulated by this legislation is activity protected by the First Amendment. This means that its regulation must be necessary to serve a compelling state interest and that it be narrowly drawn to achieve that end. Widmar v. Vincent, 454 U.S. 263 (1983).

The Supreme Court has stated that "[f]or at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138 at 142 (1981). Limits on speech during public employment must represent a balancing of the interests of the employee, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, 391 U.S. 563 (1968). The limits on speech following employment must meet the more stringent standard we

presented of the outset. U.S. v. Snepp, 444 U.S. 507 (1980), reh. den. 445 U.S. 972 and reh. den. 445 U.S. 972.

The fact that the proposed regulations apply only to government employees and only to activities that they perform for a fee and in the service of others does not alter its character as speech protected by the First Amendment.

The fact that the activity restricted is on behalf of a foreign entity or person and is done for pay does not affect its status as protected expression although it might determine the nature of the state interest involved and of the appropriate balancing of interests. [See generally, Attorney General of the United States v. Irish People, Inc., 684 F. 2d 928 (1982)].

Thus we deal here with restrictions on political activity which must be analyzed according to traditional First Amendment standards. As the Supreme Court has set forth in numerous cases, any statute regulating political speech must meet three criteria: (1) a compelling state interest must be at stake; (2) there must be a demonstrated need for the regulation; and (3) the restriction must be narrowly drawn so as not to impose limitations greater than those necessary to protect the interest at stake.

Compelling State Interest

We have no doubt that the state has the right to protect itself from the kinds of abuses that this statute aims to deal with and that these are the kinds of compelling state interests that could justify some limits on speech. We need not dwell on these interests such as conflict of interest or protecting confidential information. It is sufficient to observe that the current statutory limits on post-employment political activity are, in our view, within the limits approved by the Supreme Court.

It is when we apply the second and third tests of constitutional regulation that we begin to have doubts about the

legislation as originally introduced, and as it has been revised.

Demonstrated Need

We believe that the cases make clear that there must be more than a fear or suspicion that activity would lead to harm to the interest before limits are justified. We rely in particular on two cases, one upholding the Hatch Act United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973), (hereafter CSC); and one upholding some portions of the election reform act passed after Watergate and finding other sections unconstitutional. Buckley v. Valeo, 424 U.S. 1 (1976)

In the CSC case, which the ACLU believes was wrongly decided, the court upheld the Hatch Act prohibitions on political activity by current government employees. However, it did so only after a review of the long history of abuses that the act was designed to correct. Similarly, in Buckley the court upheld restrictions on campaign contributions only after reviewing the evidence that the existing procedures had led to substantial corruption.

In applying this standard to the current situation, we believe that the Congress can act only in those areas where there is a record of abuse. For example, we know of no evidence that former members of Congress or judges have engaged in activities which require regulation. Thus we believe that the draconian provisions in the bill related to former members or judges would not stand up to a challenge.

Narrowly Drawn Restrictions

The third criteria requires the Congress to narrowly tailor the restriction to deal with the abuse. The most flagrant violation of this principle in the original bill was the life time ban on lobbying for a foreign power by a former high official. We believe that any such limitation must be limited to a few years or to the use of classified or otherwise privileged information which is still relevant to the relations between the United States and the country being represented.

The New Draft Bill

Now we turn to what we understand to be the current draft of

the proposed legislation which was provided to us yesterday morning by the committee staff. Although this draft is a marked improvement from earlier versions, it does not in our view, meet constitutional standards. It also fails to take account of the significant benefits to our society which come from the lobbying activities of former officials and from their ability to contribute significantly to public debate. Moreover, the legislation is likely to lead to a mass exodus of government officials anxious to avoid the limits and to difficulty recruiting talented individuals who have in the past, and expect in the future, to make their living in lobbying or working to shape public policy.

We offer some general observations about the structure of the proposed bill. We see no basis for including either members of Congress or federal judges in the scheme of prohibitions. There is simply no record of abuse of any kind to justify restrictions which interfere with First Amendment rights and which might increase the difficulty of persuading competent individuals to run for elective office or to accept judicial appointment. We also do not see any basis for imposing more draconian restrictions because the lobbying is on behalf of a foreign power. If a former official is abusing his or her trust by representing an interest seeking advantage from the government the abuse is present whether the entity being represented is a foreign power or a domestic firm. Finally, we believe that the exception for educational and other charitable institutions should apply if the institution engages in lobbying to the full extent permitted by the relevant laws.

Turning to the specific prohibitions, we believe that they go too far and err in seeking to establish prohibitions based simply on position and years without regard to the degree of involvement that a person had in an issue.

We urge instead that the committee seek to clarify and expand the restrictions based on the agency that the official worked in and the involvement that he or she had in the issue concerned. For example, we believe that senior White House

officials might be barred from lobbying the Executive Branch as a whole for several years, and that other senior officials might be barred from lobbying their agency for several years provided that the prohibition apply only to senior political appointees and not to all of those above the rank of GS-14.

We also believe that it would be appropriate and constitutional to bar officials of any rank from lobbying or representing anyone on an issue on which they worked in a substantial way within the government or about which they possess relevant information which the government has the right to keep secret. Such information might include classified information, or information related to negotiating positions or tactics. The bar in such situations should relate not to a specified period of years but to the continued currency of the information.

The 10 year prohibition on representing a foreign power is, in our view, unconstitutional even though it is limited to a narrow category of senior officials. At the very least such a prohibition should expire if the party controlling the White House changes in the interim.

Mr. Chairman, we appreciate the opportunity to appear before you and to present our views on this important issue. We recognize the strong feeling on the committee and in the country to deal with what is perceived to be a serious problem. However, where First Amendment values are implicated as they are here, the Congress must proceed with caution. We are ready to work with your staff to craft language which will deal with the real abuses which have been uncovered while remaining faithful to the dictates of the Constitution.

We would, of course, be pleased to respond to any questions.

Senator MATHIAS. Thank you.
Mr. Berman.

STATEMENT OF JERRY J. BERMAN

Mr. BERMAN. Time is getting late and I will just respond to questions with Mr. Halperin.

Senator MATHIAS. Well, I find myself in such general agreement with this panel that it is hard to raise any very serious questions. I even have to agree with Mr. Ornstein and his Secretary of State analysis because I do not believe, except in those rare cases where the candidate for Secretary of State is a millionaire, is financially so independent that it does not matter, that he would not have to at least stop and consider an effective professional bar to any further activity, and even in the case of someone who was financially independent, to be professionally prohibited would be a substantial deprivation of a normal activity.

Mr. ORNSTEIN. Exactly. I think, to use one of the examples Senator Biden used, there is no doubt in my mind that Ed Muskie, when faced with the choice of going to become Secretary of State for a period of a year, with no guarantee of anything more than that, leave the U.S. Senate, and then be barred in effect from conducting anything reasonable that he might do with his livelihood and the rest of his professional career would have flatly said no, and we would have been deprived of having that dual experience which even today is very useful to all of us, having somebody who served in both—

Senator MATHIAS. Mrs. Muskie might have had a view on the subject.

Mr. HALPERIN. Could I defend Senator Biden in his absence. I think there were at least two people who have been in the room this morning who would take the Secretary of State's job, even with the original bill as introduced.

Mr. BERMAN. I am hoping he takes it. [Laughter.]

One point that Senator Biden—let me attack him in his absence—he mentioned that there may be a distinction between American firms and foreign firms and the British Airways case and landing rights. It may be that the distinctions in law can be made and burdens can be placed on foreign countries and representation, but the issue is whether it can be done at the expense of the first amendment rights of American citizens.

Senator MATHIAS. Precisely. I did not take the time at the moment to make that point, but it is not just British Airways that you are affecting, you are affecting the American bar.

Mr. BERMAN. It could apply to an ex-Member of Congress who may want to help Svimbi gain funds and support from this country for a particular cause. It may apply to an ex-Member of Congress or a Member of the Senate outraged about a future Vietnam, who wants to engage in political activity. This statute would bar simply on a categorical basis for a period of years, with no seeming relationship to a particular narrow harm, Members doing that or former officials from doing that. We think that that does raise constitutional questions and as we sat here through the morning and listened to the witnesses, we are still at a loss to understand where

the articulable harm is coming from outside of an "appearance" of a generalized harm that Senator Biden refers to.

The issue is not "So what?" It makes all the difference in the world if you have not laid down a compelling state interest or a case of harm for these kinds of categorical prohibitions.

Senator MATHIAS. I think we are in pretty good agreement, those of us who are left. Let us vote. [Laughter.]

Mr. ORNSTEIN. I would like to make one other point just to go in the record, hoping that other members of the committee who are not here will address the record. The fact is we are moving more and more toward an independent world where the distinctions between domestic entities and foreign entities are becoming blurred and will continue to move in that direction. We may be able to make a distinction now between British Airways and Pan Am. My guess is, in 5 or 10 years there will not be such distinctions. We are clearly finding those distinctions going away when it comes to the automobile industry, it is happening just simply across the board.

And to suggest that we can blithely define foreign entity here and have it last for the ages, we are going to create an even bigger problem down the road because there will not be any such thing as a domestic entity.

Senator MATHIAS. I think that is a very realistic point.

Mr. Halperin, you wanted to——

Mr. HALPERIN. Yes, can I beat that horse one more time. The harm that we are talking about here is somebody going into the Government, gaining information or gaining access to people and then coming out and putting that at the service of something other than the Government that he or she was working for. I do not find that any less objectionable if one is putting it at the service of a domestic corporation or a foreign corporation.

If you are abusing your trust by using information or access that you learned as a result of being in the Government, then that abuse is the same, no matter on whose behalf you are doing it. If you are not abusing your trust, if you are not using information that you learned in the Government, if you are not using access or influence that you got as a result of being in the Government, then you have a right as a citizen to put your expertise, your energy, whatever, at the service of any entity that you want to work for as long as that is consistent with the other laws of the country.

Senator MATHIAS. You go out to represent Caesar's Palace just because it happens to be owned by Americans, it does not make any difference.

Mr. HALPERIN. Right.

Senator MATHIAS. Well, you wanted to provide some additional analysis.

Mr. HALPERIN. We would like to put in the record an analysis of the testimony this morning suggesting that the law would be constitutional.

Senator MATHIAS. I would welcome that and we will direct that it be made a part of the record. Now, as far as the time limit, you know that the chairman has talked about marking this bill up tomorrow. In light of today's hearing, I think we will just have to wait and see, but the Defense Department asked for a week to file

their additional material and so I would say get it at least within that time limit.

Mr. HALPERIN. We would also like to put comments in the record specifically on what ever is the final bill that the committee is considering. We have been trying to catch up with that and——

Senator MATHIAS. I will be as interested as you are.

Mr. HALPERIN. Thank you.

Senator MATHIAS. Thank you for being here.

Mr. HALPERIN. Thank you.

Mr. ORNSTEIN. Thank you.

Senator MATHIAS. The committee stands in recess subject to the call of the Chair.

[Whereupon, at 1:06 p.m., the committee was adjourned, subject to the call of the Chair.]

APPENDIX

MILBANK, TWEED, HADLEY & McCLOY

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June 18, 1986

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Having long had good reason to respect the fairminded consideration you always give to opposing views, I am writing to express concern about the implications and potential consequences of S. 2334, the "Integrity in Post Employment Act of 1986."

The integrity of the post-employment conduct of former government employees is, of course, an appropriate public concern. The public interest demands that government decisions be rendered on the basis of the legitimately relevant considerations, not extraneous or improper influences. Quite clearly, however, there is a proper role for the effective representation of the outside interests, including those of foreign governments, that are affected by contemplated government action. This, indeed, has been taken for granted in S. 2334, whose principal effect would be to defer such representation for a number of years depending on the type and level of the ex-employee's former position.

As to interests other than foreign governments, the bill's modifications of existing law merely invite the question whether the changes are needed or worthwhile. The important issue -- and debatable -- raised by the bill concerns its 10-year ban on the representation of foreign governments by former cabinet and subcabinet members and certain other key officials. And here the controlling fact is not that the client is a foreign government, for if that were so, the ban would be of equal duration for all former government employees. It is, rather, the significance appropriately to be attached to the former employee's rank.

- 2 -

Now it is no doubt true that former cabinet members and the like have ordinarily had frequent occasion to deal with Senators and Congressmen and other high-level people and that those contacts have often given rise to relationships of mutual trust and confidence, if not of friendship. Standing alone, however, these circumstances may as easily serve the public interest as abuse it. It seems to me genuinely questionable whether the latter possibility justifies preventing for a decade a foreign government's seeking the benefit of the knowledge, experience, and wisdom of a former senior official. Indeed, the former employee's contribution will often be to moderate or limit the foreign government's position and facilitate the constructive resolution of difficult issues. On its face, therefore, the rationale for the ban is the presumption that sometime officials will abuse their relationships with former colleagues--and that the latter will let them do so. Any such presumption fosters cynicism and erodes the public trust without which no representative self-government is possible.

The bill also raises two other concerns. One is that it will add still another deterrent to government service. Given the discouragements already attributable to disclosure requirements and the serious lag in top-level government salaries, the broadening of bans on post-employment representation would add still another reason for turning down opportunities for public service. This is a particularly serious concern as it applies to presidential appointees who have to be recruited from the private sector and who will in any case (and usually all too soon) return to it. The second concern stems from the bill's over-breadness, a flaw which might, to be sure, be corrected by tighter drafting. As it stands, the bill would prohibit even such benign services as assistance to developing countries in coping with the problems of economic growth, corruption, or drug abuse.

I appreciate as always the opportunity to submit my views to your distinguished committee, and I am grateful for your willingness to consider them.

With highest esteem,

Faithfully,



Elliot L. Richardson

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